DATO' AZIZAN ABD RAHMAN & ORS v. CONCRETE PARADE SDN BHD & ORS AND OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
NALLINI PATHMANATHAN FCJ
RHODZARIAH BUJANG FCJ
[CIVIL APPEAL NOS: 02(f)-77-08-2022(W), 02(f)-80-08-2022(W), 02(f)-81-08-2022(W) & 02(f)-82-08-2022(W)]
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[2024] CLJ (JT5)

Abstract – *The balance between the pursuit of lawful entrepreneurial goals by management, by raising capital through the issuance of new shares, as against the pre-emptive rights of shareholders, is a legitimate concern in company law. The shareholders' fear of shares dilution and voting power, is to be weighed against the need to restructure and pursue growth in the interests of the company as a whole. Hence, in ensuring that a balance is struck between the competing interests of shareholders and directors in pursuing their business goals, s. 75(1)(a) of the Companies Act 2016 ('Act') prohibits the management of a company from exercising any power to allot shares in the company without the prior approval of the company in a general meeting. Section 85 of the Act further safeguards shareholders' rights by providing pre-emption rights in relation to the issuance of new shares. These rights, however, are subject to the constitution of the company. In this respect, the content of the company's constitution is given recognition and acknowledgment, and it prevails over the statutory rights under s. 85(1) of the Act.*

COMPANY LAW: *Mergers and take overs – Underlying principles – Proposed allotment and issuance of new shares – Powers of directors in issuance of shares – Exemptions where issuance is part consideration for acquisition of asset – Pre-emptive rights – Whether statutorily provided – Whether subject to constitution of company – Whether constitution of company prevails over pre-emptive rights under statute – 'Subject to direction to the contrary by the company at general meeting' – Whether required prior approval at general meeting – Whether shareholders given sufficient notice – Whether approval obtained – Whether share buy-back transactions undertaken in good faith and in interest of company – Companies Act 2016, ss. 75(1), (2), 85(1), 223(1)(b)(i) & (ii)*

COMPANY LAW: *Oppression – Minority shareholders – Proposed allotment and issuance of new shares – Whether shareholders aware of pre-emptive rights – Whether share buy-back transactions undertaken in good faith and in interest of company – Whether undertaking of transaction without authorisation in company's articles of association amounted to illegality per se – Whether illegality*

could form basis for complaint of oppression – Whether minority shareholders suffered unfair prejudice – Whether non-compliance with s. 127 of Companies Act 2016 established – Whether oppression made out

STATUTORY INTERPRETATION: *Construction of statute – Interpretation – Companies Act 2016, s. 223(1)(b)(i) & (ii) – Whether both limbs to be read disjunctively – Whether 'or' means 'alternatively', and cannot be construed to mean 'and' – Whether sufficient for either s. 223(1)(b)(i) or (b)(ii) to be adhered to – Purpose – Whether to ensure shareholders aware of and approve any proposed corporate transaction that will materially affect company*

WORDS AND PHRASES: *'subject to direction to the contrary by the company at general meeting' – Whether 'subject to direction' means subject to instruction or order or stipulation – Whether directors bound to ascertain and obtain approval of shareholders at general meeting for proposed issuance of shares – Companies Act 2016, s. 85(1)*

Apex Equity Holdings Bhd ('Apex Equity') and JF Apex Securities Bhd ('JF Apex'), a wholly-owned subsidiary of Apex Equity, were public listed companies. JF Apex was engaged in the stockbroking business and held a licence issued under the Capital Markets and Services Act 2007 ('CMSA'). A business merger was planned which involved the amalgamation of the stockbroking business of JF Apex and one Mercury Securities Sdn Bhd ('Mercury'), which was also engaged in the stockbroking and corporate advisory business. It was intended that Mercury would transfer its stockbroking business to JF Apex. The merger would result in Mercury being absorbed into, or merged with JF Apex. The licence, assets and liabilities of Mercury would be merged with JF Apex. The new merged entity would see a change in controller and in its shareholding. The proposed merger was conditional upon several conditions being met, *inter alia*: (i) approval by the regulatory authorities, namely the Securities Commission ('SC') and Bursa; (ii) approval by the shareholders; and (iii) a vesting order from the High Court, pursuant to s. 139 of the CMSA, to effect the transfer of the business assets and liabilities. The essential matters were put into writing in a document entitled the Heads of Agreement ('HOA'), executed by Apex Equity and Mercury only, on 21 September 2018. JF Apex was not a party to the HOA although it comprised the primary entity in the proposed business merger between the two entities. Apex Equity provided the consideration for the merger. The HOA specifically stipulated that its objective was to set out the mutual understanding of the parties and the essentials of the proposed merger with the further goal of entering into a business merger agreement. Further, there were express conditions precedent to be fulfilled, one of the primary conditions being the procurement of the approval of the shareholders of Apex Equity at general meeting. Subsequently, the business merger agreement ('BMA'), a tripartite agreement

between Apex Equity, JF Apex and Mercury was executed on 18 December 2018. On the same day, eight separate conditional subscription agreements for the private placements were executed which would also require the shareholders' approval. An announcement was made on the same day for the proposed merger and private placements. It was therefore public knowledge that such private placement agreements were for the purposes of raising capital for the part-financing of the business merger. Some two months after the announcement, Concrete Parade Sdn Bhd ('Concrete Parade'), the dissenting minority shareholder of Apex Equity, filed an originating summons ('OS 56'), pursuant to s. 346 of the Companies Act 2016 ('Act'), to: (i) render the share buy-back transactions a nullity and set aside the validation order; and (ii) invalidate the HOA, the BMA and the subscription agreements for the private placements. This would effectively defeat/ extinguish the proposed business merger. Pending the disposal of OS 56, JF Apex obtained from the SC the approval for change of controller of JF Apex and the variation of the licenses to include the approved regulated activities of Mercury together with an assignment or transfer of the relevant licenses originally held by Mercury. Also, pending the disposal of the oppression action, the proposed merger and the private placement were approved by the shareholders of Apex Equity at an extraordinary general meeting No 1 ('EGM No 1'). There was a full discussion of the rights of pre-emption in relation to the proposed newly issued shares for the private placement. As such, the shareholders were specifically made aware of their rights of pre-emption under s. 85 of the Act, article 11 was mentioned and notwithstanding this, the general body of shareholders by majority decided to approve the resolutions. Following the approval obtained at EGM No 1 and pursuant to the condition precedents contained in the BMA, on 27 June 2019, Mercury and JF Apex made a joint application to the High Court under s. 139 of the CMSA and obtained the vesting order. However, the vesting order was subsequently set aside by the High Court on the application of another shareholder. The second EGM was held on 18 November 2019 (EGM No 2). The notice of EGM was accompanied by a fresh circular outlining the details, rationale and justification for the proposed merger and private placement. Approval was obtained for a second time on 18 November 2019. On 7 August 2019, Concrete Parade's claim for oppression in OS 56 had been dismissed by the High Court. On appeal to the Court of Appeal, the decision of the High Court was reversed. However, by this date, the proposed merger was effectively halted. The appellants thus obtained leave to appeal to the Federal Court. The issues for the court's consideration were, *inter alia*: (i) the construction to be accorded to s. 85 of the Act in the context of the balance to be achieved. Must shareholders' approval be obtained in every instance where newly issued shares are to be allotted and issued for the purposes of raising capital or do exemptions and exceptions subsist by virtue of the constitution of the company? If they do,

could they be given effect to?; (ii) the precise point in time when directors are to obtain shareholders' approval for the acquisition or disposal of an undertaking or property of a substantial value, in the context of s. 223 of the Act. This was related to the proper construction to be accorded to s. 223 of the Act; (iii) whether a contravention of the Act in relation to share buy-back transactions which were subsequently validated, amounted to an act of oppression *vis-à-vis* Concrete Parade; and whether s. 582(3) be utilised to rectify such a contravention; and (iv) whether the use of the oppression provision was the proper means of remedying Concrete Parade's grievances, if such grievances were made out.

Held (allowing appeals with costs; setting aside decision of Court of Appeal and reinstating decision of High Court)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) In a legislation preceding the Act, there was no statutory provision relating to shareholders' pre-emptive rights. Accordingly, pre-emptive rights under the preceding legislation was contractual in nature, between: (i) shareholders and those in management, *ie*, the directors, who represented the company; and (ii) shareholders *inter se*. The directors of a company were accorded the power to allot shares as provided for in the memorandum and articles of the company and were expected to exercise the power of allotment and issuance *bona fide*, for proper purposes and in good faith. (paras 104-105)

(2) Section 75 appears to deal primarily with allotment, while s. 85(1) of the Act deals with the issuance of shares which may affect pre-emptive rights of shareholders. While s. 75(1) of the Act provided that prior approval of shareholders was required before directors could exercise the power of issuance and allotment, s. 75(2) provided a range of exceptions or exemptions. The Act not only expands the ambit of power of the directors in relation to the issuance of shares, but specifically provides for such an exemption where the issuance is part consideration for the acquisition of an asset. Section 85(1) of the Act grants a statutory privilege to existing shareholders of a company, allowing them to maintain their proportional ownership in the company by providing them with the opportunity to purchase shares on a *pro-rata* basis before they are issued to outsiders. However, this pre-emptive right is subject to the constitution of the company. As the constitution of Apex Equity in article 11 (per requirement of 7.08 MMLR) required approval for the issuance of new shares, as contained in the words 'subject to direction to the contrary by the company at general meeting', it followed that the directors were bound by virtue of s. 85(1) to ascertain and obtain the approval of the shareholders at general meeting for such proposed issuance of shares, although such issuance was for the financing or part-consideration for a proposed acquisition. (paras 119-121, 135 & 139)

(3) Article 11 mirrors requirement 7.08 of the MMLR. As such, the construction accorded to the terms 'Subject to direction to the contrary by the company at general meeting' will be applicable. The term 'subject to direction' means subject to instruction or order or stipulation. Applied to article 11, these words in their plain and ordinary sense mean that where the shareholders at general meeting 'direct' or instruct, or command, or communicate that they: (i) do not oppose the business merger or the private placement for purposes of part payment; or (ii) do not want to exercise their pre-emptive rights under article 11 (and s. 85(1)), then that is sufficient to allow the management, *ie*, the directors to proceed with the raising of capital by issuing new shares to third party places. 'Direct' or 'direction' does not, of itself, require that either pre-emptive rights to shares or s. 85(1) be explained to shareholders, whether by way of circular or otherwise. To therefore impose conditions amounts to an unwarranted expansion of the intent and purpose of s. 85(1). (paras 167 & 175-177)

(4) Pre-emptive rights of shareholders in a company's constitution are contractual in nature and the final contract relating to such rights are determined by the shareholders and the management of the company. Shareholders are or should be aware of their pre-emptive rights as stipulated in the constitution of the company in which they have chosen to invest or in having contracted specifically for pre-emptive rights. In such event they ought to possess sufficient knowledge to approve or reject the proposed corporate acquisition or merger involving the issuance of new shares, without the necessity of specifying and explaining the law and requiring an express statement to the effect that they comprehend their pre-emptive rights under the statute and the constitution and are prepared to disapply or relinquish those rights. (paras 184, 186 & 187)

(5) The correct legal construction to be accorded to s. 223(1)(b)(i) and (ii) is that the two 'limbs' or sub-paragraphs have to be read disjunctively and not conjunctively. The use of the word 'or' means 'alternatively', and cannot be construed to mean 'and'. It is sufficient if either s. 223(1)(b)(i) or (b)(ii) is adhered to. The intent and purpose of the new s. 223 remains in full accord with its predecessor, s. 132C, in that, its purpose is to ensure that shareholders are aware of, and approve of any proposed corporate transaction that will materially affect the company, due to the magnitude of the same or the effects it may have on the company. Hence, by applying the normal meaning of the word 'or', it appears from s. 223(1)(b)(ii) that the directors or management can choose to obtain such shareholders' approval at a later stage in the transaction, but before actual ownership of the asset is either acquired or parted with. (paras 257, 277, 278, 291 & 294)

(6) Apex Equity, through its directors, was in complete compliance with the law and adhered to the same in relation to the procurement of shareholders' approval at a general meeting. The fact that the BMA contained a condition precedent to the effect that shareholders' approval at general meeting had to be obtained for the proposed acquisition of Mercury by Apex Equity through the merger between Mercury and JF Apex, meant that Apex Equity complied with sub-para. (b)(i) of s. 223(1). Having done so, there was no necessity for it to further comply with sub-para. (b)(ii) because, in the absence of shareholders' approval, the proposed acquisition would fall through or fail. (paras 289 & 290)

(7) There was a lack of authorisation in the articles of association of Apex Equity allowing it to purchase its own shares. The share buy-back transactions appear to have been undertaken in good faith and in the interest of the company. This is borne out by the fact that the directors took the issue of these buy-backs to the shareholder organ on a yearly basis, despite there being no requirement to do so. Hence, in relation to s. 67A of the Companies Act 1965 ('CA 1965'), it was not possible to stipulate with any certainty whatsoever that the share buy-back transactions undertaken without authorisation in the articles of association of Apex Equity amounted to an illegality *per se*. It follows that the alleged illegality of those share buy-back transactions could not form the basis for a complaint of oppression. Even if it did, it was not evident how Concrete Parade suffered unfair prejudice as compared to any of the other shareholders. (paras 317, 320, 326 & 327)

(8) A contravention of sub-s. (1) of s. 67A of the CA 1965 and/or s. 127 of the Act, does not equate to Concrete Parade being unfairly prejudiced by the majority in the carrying out of these share buy-back transactions. Apex Equity was at all times solvent, made the purchases through the Exchange and did so in the best interests of the company, *bona fide*. The thrust or intent of s. 67A of the CA 1965 and s. 127 of the Act is to preclude and prohibit the purchase of a public listed company's own shares unless there is authorisation, and to ensure that such purchases are undertaken when the company is financially healthy, transacted through the exchange and are *bona fide* in the interests of the company. Concrete Parade approved and acquiesced to the share buy-back provisions from 2013 or 2014 onwards. When the lack of authorisation was made known by Concrete Parade, the immediate reaction of Apex Equity was to seek to regularise the matter. The lack of notice, in itself, is incapable of comprising prejudicial conduct by the majority shareholders against it, a minority shareholder as envisaged under s. 346. Therefore, it was difficult and untenable to conclude that the lack of compliance with sub-s. (1) of s. 67A of the CA 1965 or s. 127 of the Act respectively,

ie, the fact of the purchases being *ultra vires* the constitution, resulted in oppressive conduct against Concrete Parade. Oppression had not been made out. (paras 333-335, 337, 340 & 349)

(9) This was not a case where the illegality was *ex facie* apparent. The purchase by a public listed company of its own shares was in point of fact permitted under s. 67A of the CA 1965 and s. 127 of the Act. The fact that one subsection in those sections had not been complied with did not automatically mean that the entire transaction was void for illegality. Therefore, the order of 29 August 2018 by the High Court was not a nullity by reason of illegality. (para 356)

(10) The failure to join the majority shareholders who were alleged to have oppressed Concrete Parade was fatal to an oppression action which was premised on unfairly prejudicial conduct by the majority against the minority. Concrete Parade's grievance was, in reality, against the decision of the majority, or majority rule, which grievance it sought to couch in terms of an oppression action under s. 346 of the Act. This was an abuse of the statutory oppression remedy. Sections 85, 223 and article 11 conferred the ultimate decision in relation to the corporate transaction or merger, to the shareholders. It was incorrect for Concrete Parade to hold only the directors liable for the oppression related complaints because the directors played no role in the voting. Moreover, such prayers and reliefs did not align with a claim under s. 346 of the Act. (paras 367, 370, 373 & 374)

Obiter dictum:

(1) The fact that an incorrect and long overruled decision was cited to the Court of Appeal in the instant case, warranted further comment. The net effect of the error was to cause the court to arrive at a decision which it might not have, if the law had been correctly and fully cited. This is of importance because such mistakes carry grave consequences, such as an erroneous decision by the court. This in turn, can have considerable effect on the manner in which corporate transactions are carried out generally within the jurisdiction. It was therefore incumbent upon counsel to ascertain that a case cited is the correct and most recent pronouncement of the principle it is sought to support. The citing of a case that has been overruled can arise from ignorance coupled with a lack of diligence at one end of the scale, to misleading at the other end. Misleading carries with it shades of dishonesty, which is anathema to any solicitor or barrister practicing before a court, to whom the barrister owes his primary duty. Given the growing tendency to cite authorities which are not relevant, or to fail to point out salient differing features such as the overruling of a decision, such instances of misleading should not simply be ignored, or mentioned in passing, but should be subject

to censure and disciplinary action. This court has had occasion previously of highlighting the importance of determining that authorities are researched with sufficient particularity to ensure that the courts are not misled. (paras 202-205)

Bahasa Melayu *Headnotes*

Apex Equity Holdings Bhd ('Apex Equity') dan JF Apex Securities Bhd ('JF Apex'), sebuah anak syarikat milik penuh Apex Equity, adalah syarikat-syarikat dalam senarai awam. JF Apex terlibat dalam perniagaan pembrokeran saham dan memegang lesen bawah Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP'). Satu penggabungan perniagaan dirancang yang melibatkan penyatuan perniagaan pembrokeran saham JF Apex dan Mercury Securities Sdn Bhd ('Mercury'), yang juga terlibat dalam perniagaan pembrokeran saham dan penasihat korporat. Mercury diniatkan akan memindahkan perniagaan pembrokeran sahamnya kepada JF Apex. Penggabungan ini akan menjurus pada Mercury diserap ke dalam, atau digabung dengan JF Apex. Lesen, aset-aset dan liabiliti-liabiliti Mercury akan digabung dengan JF Apex. Penggabungan entiti baru ini akan membawa pada perubahan kawalan dan pegangan saham. Penggabungan yang dicadangkan tertakluk pada beberapa syarat yang perlu dipatuhi, antara lain: (i) kelulusan pihak berkuasa peraturan, iaitu Suruhanjaya Sekuriti ('SC') dan Bursa; (ii) kelulusan pemegang-pemegang saham; dan (iii) perintah peletakan hak daripada Mahkamah Tinggi menurut s. 139 APMP untuk melaksanakan pindahan aset-aset dan liabiliti-liabiliti perniagaan. Perkara-perkara penting telah dimasukkan secara bertulis dalam dokumen bertajuk Heads of Agreement ('HOA'), yang dimeterai oleh Apex Equity dan Mercury sahaja, pada 21 September 2018. JF Apex bukan pihak dalam HOA walaupun ini membentuk entiti utama dalam penggabungan peniagaan yang dicadangkan antara kedua-dua entiti tersebut. Apex Equity telah memperuntukkan balasan untuk penggabungan tersebut. Secara spesifik, HOA menyatakan bahawa tujuannya adalah untuk membina persefahaman pihak-pihak dan perkara-perkara penting penggabungan yang dicadangkan dengan matlamat lanjut memasuki perjanjian penggabungan perniagaan. Selanjutnya, terdapat syarat-syarat awalan jelas yang perlu dipenuhi, salah satu syarat penting adalah pemerolehan kelulusan pemegang-pemegang saham Apex Equity dalam mesyuarat agong. Kemudian, perjanjian penggabungan perniagaan ('BMA'), satu perjanjian tiga pihak antara Apex Equity, JF Apex dan Mercury dimeterai pada 18 Disember 2018. Pada hari yang sama, lapan perjanjian langganan bersyarat untuk pelupusan persendirian dimeterai yang juga akan memerlukan kelulusan pemegang-pemegang saham. Satu pengumuman dibuat pada hari yang sama berhubung penggabungan yang dicadangkan dan pelupusan persendirian. Oleh itu, adalah diketahui umum bahawa perjanjian pelupusan persendirian adalah untuk tujuan meningkatkan modal untuk sebahagian pembiayaan penggabungan perniagaan. Kira-kira

dua bulan selepas pengumuman itu, Concrete Parade Sdn Bhd ('Concrete Parade'), pemegang saham minoriti Apex Equity yang menentang, memfailkan saman pemula ('OS 56') menurut s. 346 Akta Syarikat 2016 ('Akta') untuk: (i) menyebabkan transaksi beli balik saham tidak sah dan mengenepikan perintah pengesahan; dan (ii) membatalkan HOA dan BMA dan perjanjian langganan untuk pelupusan persendirian. Ini pada asasnya akan melenyapkan penggabungan perniagaan yang dicadangkan. Sementara pelupusan OS 56, JF Apex memperoleh daripada SC kelulusan untuk mengubah kawalan JF Apex dan mengubah lesen untuk memasukkan aktiviti-aktiviti terkawal Mercury yang diluluskan bersama-sama dengan penyerahan atau pindah milik lesen-lesen relevan yang dipegang Mercury. Juga, sementara pelupusan tindakan penindasan, penggabungan yang dicadangkan dan pelupusan persendirian diluluskan oleh pemegang-pemegang saham Apex Equity dalam mesyuarat agong luar biasa No 1 ('EGM No 1'). Hak beli dahulu berkaitan pengeluaran saham-saham baharu yang dicadangkan untuk pelupusan persendirian dibincangkan secara menyeluruh. Oleh itu, pemegang saham mengetahui secara khusus tentang hak beli dahulu mereka bawah s. 85 Akta, artikel 11 disebut dan walaupun demikian, majoriti badan umum pemegang saham memutuskan untuk meluluskan resolusi itu. Berikutan kelulusan yang diterima dalam EGM No 1 dan menurut syarat awalan yang terkandung dalam BMA, pada 27 Jun 2019, Mercury dan JF Apex membuat permohonan bersama ke Mahkamah Tinggi bawah s. 139 APMP dan memperoleh perintah peletakan hak. Walau bagaimanapun perintah peletakan hak itu kemudiannya diketepikan oleh Mahkamah Tinggi atas permohonan pemegang saham lain. EGM kedua diadakan pada 18 November 2019 (EGM No 2). Notis EGM disertai dengan pekeliling baharu yang menyenaraikan butir-butir, rasional dan justifikasi untuk penggabungan yang dicadangkan dan pelupusan persendirian tersebut. Kelulusan diperoleh kali kedua pada 18 November 2019. Pada 7 Ogos 2019, tuntutan penindasan oleh Concrete Parade dalam OS 56 ditolak Mahkamah Tinggi. Atas rayuan ke Mahkamah Rayuan, keputusan Mahkamah Tinggi diakas. Walau bagaimanapun, pada masa itu, penggabungan yang dicadangkan telah terhenti. Perayu-perayu, oleh itu, memperoleh kebenaran merayu ke Mahkamah Persekutuan. Isu-isu untuk pertimbangan mahkamah adalah, antara lain: (i) tafsiran yang perlu diberi pada s. 85 Akta dalam konteks imbangan yang perlu dicapai. Sama ada kelulusan pemegang saham perlu diperoleh dalam setiap keadaan apabila saham yang baharu dikeluarkan akan diumpukkan dan dikeluarkan untuk tujuan meningkatkan modal atau pengecualian terpakai beikutan perlembagaan Syarikat. Jika ya, bolehkah itu dilaksanakan?; (ii) masa yang tepat yang mana pengarah-pengarah perlu memperoleh kelulusan pemegang saham untuk perolehan atau pelupusan akujanji atau hartanah yang bernilai tinggi, dalam konteks s. 223 Akta. Ini berkait dengan tafsiran yang wajar diberi untuk s. 223 Akta; (iii) sama ada pelanggaran Akta berkaitan dengan transaksi beli balik saham yang kemudiannya disahkan, membentuk tindakan menindas berkaitan Concrete

Parade; dan sama ada s. 582(3) boleh digunakan untuk membetulkan pelanggaran itu; dan (iv) sama ada penggunaan peruntukan penindasan adalah cara wajar untuk membaiki kilanan Concrete Parade, jika kilanan sedemikian terbukti.

Diputuskan (membenarkan rayuan-rayuan dengan kos; mengenepikan keputusan Mahkamah Rayuan dan mengembalikan keputusan Mahkamah Tinggi)
Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Dalam perundangan sebelum Akta, tiada peruntukan statutori berkaitan hak beli dahulu pemegang-pemegang saham. Dengan itu, hak beli dahulu bawah perundangan terdahulu bersifat kontrak, antara: (i) pemegang saham dan pihak pengurusan, iaitu, pengarah-pengarah yang mewakili syarikat; dan (ii) antara pemegang-pemegang saham sesama sendiri. Pengarah-pengarah syarikat diberi hak pengumpukan saham seperti yang dinyatakan dalam memorandum dan artikel syarikat dan diperlukan untuk melaksanakan kuasa pengumpukan dan pengeluaran secara *bona fide*, untuk tujuan wajar dan secara suci hati.

(2) Seksyen 75, pada asasnya, adalah berkaitan dengan pengumpukan, manakala s. 85(1) Akta berkait dengan pengeluaran saham yang boleh menjejaskan hak beli dahulu pemegang saham. Walaupun s. 75(1) Akta memperuntukkan bahawa kebenaran pemegang saham perlu didapatkan terlebih dahulu sebelum pengarah-pengarah boleh melaksanakan kuasa pengeluaran dan pengumpukan, s. 75(2) menyenaraikan pengecualian. Akta tersebut bukan sahaja meluaskan ruang lingkup kuasa pengarah-pengarah berkaitan pengeluaran saham, tetapi secara khusus memperuntukkan pengecualian apabila pengeluaran tersebut adalah sebahagian balasan untuk pemerolehan aset. Seksyen 85(1) Akta memberikan keistimewaan statutori kepada pemegang saham sedia ada dalam satu syarikat, membenarkan mereka mengekalkan milikan setara dalam syarikat dengan memberi mereka peluang membeli saham-saham atas dasar pro rata sebelum itu dikeluarkan kepada orang luar. Walau bagaimanapun, hak beli dahulu ini tertakluk pada pelembagaan syarikat. Oleh sebab perlembagaan Apex Equity dalam artikel 11 (menurut keperluan 7.08 MMLR) memerlukan kelulusan pengeluaran saham-saham baharu, seperti yang terkandung dalam perkataan-perkataan 'subject to direction to the contrary by the company at general meeting', pengarah-pengarah terikat menurut s. 85(1) untuk menentukan dan memperoleh kelulusan pemegang-pemegang saham dalam mesyuarat agong untuk pengeluaran saham yang dicadangkan itu, walaupun pengeluaran sedemikan adalah untuk pembiayaan atau sebahagian balasan untuk pemerolehan yang dicadangkan.

(3) Artikel 11 menggambarkan keperluan 7.08 MMLR. Oleh itu, tafsiran yang diberi pada terma 'Subject to direction to the contrary by the company at general meeting' diguna pakai. Terma 'subject to direction' bermaksud tertakluk pada arahan atau perintah atau pernyataan. Diguna pakai untuk artikel 11, perkataan-perkataan ini dalam maksud jelas dan biasa bermaksud bahawa apabila pemegang saham dalam mesyuarat agong 'mengarahkan' atau memerintahkan atau menyatakan atau memaklumkan bahawa mereka: (i) tidak membantah penggabungan perniagaan atau pelupusan persendirian untuk tujuan sebahagian bayaran; atau (ii) tidak mahu melaksanakan hak beli dahulu bawah artikel 11 (dan s. 85(1)), itu mencukupi untuk membenarkan pihak pengurusan, iaitu, pengarah-pengarah untuk meneruskan untuk menaikkan modal dengan mengeluarkan saham-saham baharu kepada pihak ketiga. 'Mengarah' atau 'arahan' tidak, dengan sendirinya, memerluksan bahawa salah satu hak beli dahulu saham atau s. 85(1) dijelaskan pada pemegang saham, sama ada melalui pekeliling atau sebaliknya. Oleh itu, mengenakan syarat-syarat menjurus pada pengembangan tidak wajar niat dan tujuan s. 85(1).

(4) Hak beli dahulu pemegang saham dalam perlembagaan syarikat adalah bersifat kontrak dan kontrak terakhir berkaitan hak sedemikan ditentukan oleh pemegang saham dan pihak pengurusan syarikat. Pemegang saham sememangnya atau sepatutnya mengetahui tentang hak beli dahulu mereka seperti yang dinyatakan dalam perlembagaan syarikat yang dipilih mereka untuk melabur atau yang dikontrak secara spesifik untuk hak beli dahulu. Dalam hal demikian, mereka sepatutnya mempunyai pengetahuan mencukupi untuk meluluskan atau menolak pemerolehan atau penggabungan korporat yang dicadangkan yang melibatkan pengeluaran saham-saham baharu, tanpa perlu mengkhususkan dan menjelaskan undang-undang dan memerlukan kenyataan jelas yang sehingga mereka memahami hak beli dahulu mereka bawah statut dan perlembagaan dan bersedia untuk melepaskan atau meninggalkan hak tersebut.

(5) Tafsiran undang-undang yang betul yang perlu diberi pada s. 223(b)(i) dan (ii) adalah kedua-dua bahagian atau sub-perenggan perlu dibaca secara berasingan dan bukan bersama-sama. Kegunaan perkataan 'atau' bermaksud 'sebagai alternatif', dan tidak boleh ditafsir untuk membawa maksud 'dan'. Tidak mencukupi jika salah satu s. 223(1)(b)(i) atau (b)(ii) dipatuhi. Niat dan tujuan s. 223 baharu kekal selari dengan Akta terdahulu, s. 132C, iaitu, tujuannya adalah untuk memastikan pemegang saham mengetahui, dan meluluskan apa-apa transaksi korporat yang dicadangkan yang akan amat menjejaskan syarikat, akibat keketaraanya atau kesan yang mungkin berlaku pada syarikat. Oleh itu, mengguna

pakai maksud biasa 'atau', jelas daripada s. 223(1)(b)(ii) bahawa pengarah-pengarah atau pihak pengurusan boleh memilih untuk memperoleh kelulusan pemegang saham semasa peringkat terkemudian transaksi, tetapi sebelum pemilikan sebenar aset, sama ada, diperoleh atau terpisah.

(6) Apex Equity, melalui pengarah-pengarahnya, telah mematuhi sepenuhnya undang-undang dan mematuhinya berkaitan dengan pemerolehan kelulusan pemegang saham dalam mesyuarat agung. Fakta bahawa BMA mengandungi syarat awalan sehingga kelulusan pemegang saham dalam mesyuarat agung perlu diperoleh untuk pemerolehan yang dicadangkan Mercury oleh Apex Equity melalui penggabungan antara Mercury dan JF Apex, bermaksud bahawa Apex Equity telah mematuhi sub-perenggan (b)(i) s. 223(1). Setelah itu, tiada keperluan untuk pematuhan lanjut dengan seub perenggan (b)(ii) kerana, tanpa kelulusan pemegang saham, perolehan yang dicadangkan akan tidak berjaya atau gagal.

(7) Tiada autoriti dalam artikel tubuh syarikat Apex Equity yang membenarkannya membeli sahamnya sendiri. Transaksi beli balik saham jelas dibuat dengan suci hati dan demi kepentingan syarikat. Ini jelas daripada fakta bahawa pengarah-pengarah mengemukakan isu pembelian balik ini kepada badan pemegang saham setiap tahun, walaupun tiada keperluan berbuat demikian. Oleh itu, berkaitan s. 67A Akta Syarikat 1965 ('Akta 1965'), tidak boleh dinyatakan dengan apa-apa ketentuan bahawa transaksi beli balik yang dibuat tanpa kuasa artikel tubuh syarikat Apex Equity sama sekali tidak sah. Berikutan itu, ketaksahan transaksi pembelian balik saham tidak boleh membentuk asas aduan penindasan. Jika ada pun, tidak dibuktikan bagaimana Concrete Parade mengalami prejudis tidak adil berbanding dengan mana-mana pemegang saham lain.

(8) Pelanggaran sub-s. (1) bawah s. 67A Akta 1965 dan/atau s. 127 Akta tidak bermaksud Concrete Parade diprejudis secara tidak adil oleh majoriti dengan menjalankan transaksi beli balik saham. Apex Equity yang pada setiap masa, mampu bayar, membuat pembelian melalui Bursa dan demi kepentingan terbaik syarikat, secara *bona fide*. Dorongan atau niat s. 67A Akta 1965 dan s. 127 Akta adalah untuk mengelak dan menghalang pembelian saham syarikat senaraian itu sendiri kecuali diberi kuasa, dan untuk memastikan pembelian sedemikian dibuat apabila kewangan syarikat kukuh, dibuat melalui Bursa dan *bona fide* demi kepentingan syarikat. Concrete Parade meluluskan dan menyetujui peruntukan beli balik saham dari 2013 sehingga 2014 ke atas. Apabila ketiadaan kuasa dimaklumkan pada Concrete Parade, reaksi segera Apex Equity adalah untuk memohon untuk mengawal atur perkara tersebut. Ketiadaan pemakluman itu sendiri tidak boleh membentuk tindakan prejudis oleh pemegang saham majoriti terhadap pemegang saham

minoriti seperti yang dibayangkan bawah s. 346. Oleh itu, untuk memutuskan ketidakpatuhan sub-s. (1) s. 67A Akta 1965 atau s. 127 Akta masing-masing, iaitu, fakta pembelian adalah *ultra vires* perlembagaan, dengan itu, mengakibatkan tindakan penindasan terhadap Concrete Parade, adalah sukar dan tidak boleh dipertahankan.

(9) Ini bukan kes yang ketaksahan adalah *ex facie* jelas. Pembelian sahamnya sendiri oleh syarikat senaraian awam sebenarnya dibenarkan bawah s. 67A Akta 1965 dan s. 127 Akta. Fakta bahawa satu subseksyen dalam seksyen-seksyen itu tidak dipatuhi tidak secara automatik bermaksud bahawa keseluruhan transaksi batal kerana ketaksahan. Oleh itu, perintah 29 Ogos 2018 oleh Mahkamah Tinggi tidak terbatal atas alasan ketaksahan.

(10) Kegagalan memasukkan pemegang saham majoriti yang dikatakan menindas Concrete Parade memudaratkan tindakan penindasan yang berdasarkan tindakan prejudis tidak adil oleh majoriti terhadap minoriti. Kilanan Concrete Parade, secara realitinya adalah terhadap keputusan majoriti atau arahan majoriti, dan kilanan itu diungkapkan sebagai tindakan penindasan bawah s. 346 Akta. Ini adalah penyalahgunaan remedi penindasan statutori. Seksyen 85, 223 dan artikel 11 memberi keputusan muktamad berkaitan dengan transaksi atau penggabungan korporat, pada pemegang-pemegang saham. Adalah salah untuk Concrete Parade memutuskan hanya pengarah-pengarah bertanggungan untuk aduan berkaitan penindasan kerana pengarah-pengarah tidak memainkan apa-apa peranan dalam pengundian. Tambahan lagi, permohonan dan relief-relief sedemikian tidak selari dengan tuntutan bawah s. 346 Akta.

Obiter:

(1) Fakta bahawa keputusan yang salah dan telah lama ditolak diberikan di Mahkamah Rayuan dalam kes ini menarik komen lanjut. Kesan akhir kekhilafan itu akan mengakibatkan mahkamah membuat keputusan yang mungkin tidak akan dibuatnya jika undang-undang dinyatakan dengan betul dan penuh. Ini adalah penting kerana kesalahan sedemikian membawa akibat teruk, seperti keputusan salah oleh mahkamah. Ini seterusnya, akan memberi kesan yang besar pada cara transaksi-transaksi korporat dijalankan secara umum dalam bidang kuasa. Oleh itu, penting untuk peguam menentukan bahawa kes yang diberi adalah betul dan berdasarkan prinsip paling baharu yang ditetapkan yang ingin disandarkannya. Pengemukaan kes yang telah ditolak boleh timbul daripada ketakendahan dan kekurangan usaha wajar di satu bahagian dan satu lagi, mengelirukan. Pengeliruan membawa bersama-samanya bayangan ketidakjujuran, yang adalah dikutuk untuk mana-mana peguam cara atau peguam bela yang beramal di mahkamah, terhadap mana

peguam bela mempunyai kewajipan utama. Berdasarkan kecendungan yang semakin bertambah untuk menyatakan autoriti-autoriti yang tidak relevan, atau gagal menyatakan ciri-ciri perbezaan penting seperti penolakan keputusan, keadaan pengeliruan sedemikian tidak boleh diendahkan sebegitu sahaja, atau dinyatakan sambil lalu, tetapi perlu dikecam dan tindakan disiplin diambil. Mahkamah ini telah sebelum ini, menekankan kepentingan bahawa autoriti-autoriti diselidik dengan teliti untuk memastikan mahkamah tidak dikelirukan.

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(dist)***

Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain [2022] 4 CLJ 657 FC ***(refd)***

Co-operative Central Bank Ltd (In Receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC ***(foll)***

Eu Finance Bhd v. Lim Yoke Foo [1982] CLJU 21; [1982] 1 LNS 21 FC ***(dist)***

Hogg v. Cramphorn Ltd [1967] Ch 254 ***(refd)***

Howard Smith Ltd v. Ampol Petroleum Ltd & Ors [1974] AC 821 ***(refd)***

In The Matter Of Tong Eng Sdn Bhd [1994] 2 CLJ 775 HC ***(refd)***

Mak Siew Wei v. Yeoh Eng Kong & Other Appeals [2019] 7 CLJ 470 CA ***(refd)***

National Westminster Bank Plc v. Inland Revenue Commissioners [1995] 1 AC 119 ***(refd)***

Pan Choon Weng v Mexvin Chow Yew Hoong & Ors [2022] CLJU 2248; [2022] 1 LNS 2248 HC ***(refd)***

Perbadanan Pengurusan Sunrise Garden Kondominium v. Sunway City (Penang) Sdn Bhd & Ors And Another Appeal [2023] 2 CLJ 333 FC ***(refd)***

Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor And Other Appeals [2012] 5 CLJ 169 CA ***(refd)***

Raja Khairulazaman Shah Raja Aziddin & Ors v. Zaman Indah Sdn Bhd [1979] CLJU 166; [1979] 1 LNS 166 HC ***(refd)***

Re Great Eastern Hotel (Pte) Ltd [1988] CLJU 198; [1988] 1 LNS 198 ***(refd)***

Seah Eng Toh Daniel & Anor v. Kingsley Khoo Hoi Leng & Ors [2016] 2 CLJ 695 HC ***(refd)***

Shanti Prasad Jain v. Kalinga Tubes Ltd & Ors [1952] 49 AIR 202 ***(refd)***

Smithton Ltd (Formerly Hobart Capital Markets Ltd) v. Naggar [2015] 1 WLR 189 ***(refd)***

Tan Chee Hoe & Sdn Bhd v. Code Focus Sdn Bhd [2014] 3 CLJ 141 FC ***(refd)***

Tan Kah Fatt & Anor v. Tan Ying [2023] 2 CLJ 169 FC ***(refd)***

Yango Pastoral Co Pty Ltd & Ors v. First Chicago Australia Ltd & Ors (1978) 21 ALR 585 ***(foll)***

Legislation referred to:

Capital Markets and Services Act 2007, ss. 139, 377

Companies Act 1965 (repealed), ss. 67A(1), 132D(6A), 355(3)

Companies Act 2016, ss. 75(1)(a), (2)(d), 76(1), 85(1), 127, 223(1)(a), (b)(i), (ii), 346, 355(3), 582(3)

Interpretation Acts 1948 and 1967, s. 17A

Companies Act 1956 [Ind], s. 81

Other source(s) referred to:

Loh Siew Cheang & Goh Ee Von, *Shareholders' Pre-Emption Rights to New Shares – The Legislative and Regulatory Scheme" [2022] 4 MLJ lxiv*

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For the 4th respondent - Wong Kah Hui & Emily Chua Yan Feng; M/s KH Wong & Co
For the 5th respondent - Rabindra S Nathan, Ganesh Nathan, Rajasurian Ramasamy, Jolin Yew Chee It & Amy Nor Hannah Norhan; M/s Jeff Leong, Poon & Wong
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[Editor's note: For the Court of Appeal judgment, please see Concrete Parade Sdn Bhd v. Apex Equity Holdings Bhd & Ors [2021] 9 CLJ 849 (overruled); For the High Court judgment, please see [2020] 6 CLJ 684 (affirmed).]

Reported by S Barathi

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] The issuance of new shares by a company for the purposes of raising capital for business acquisitions, growth and expansion is often a prescription for litigation. The balance between the pursuit of lawful entrepreneurial goals by management, by raising capital through the issuance of new shares, as against the preemptive rights of shareholders, is a legitimate concern in company law. The shareholders' fear of share dilution and voting power, is to be weighed against the need to restructure and pursue growth in the interests of the company as a whole.

[2] This concern could, arguably, be met by statutorily providing that existing shareholders always enjoy a mandatory preemptive right to buy newly issued shares. But this can be detrimental to the company itself in terms of its ability to raise fresh financing without delay, as it would be necessary to offer the shares to existing shareholders first. This is time consuming and favourable market conditions might be lost. The management or directors therefore need a degree of flexibility in order to effect growth for a company.

[3] In order to achieve an equilibrium between these legitimate competing concerns, the law strikes a delicate balance between the protection of existing shareholders, on the one hand, and the ability of the company to pursue its optimal financial goals, on the other.

[4] There are three definable rules or criteria that contribute towards achieving this balance:

(i) rules concerning the allocation of powers between directors and shareholders to decide on the issuing of new shares;

(ii) preemptive rights in case new shares are sold; and

(iii) fiduciary duties of directors engaging in the sale of new shares.

[5] That such a balance has indeed been considered and statutorily provided for in this jurisdiction in relation to the issuance of shares, is evident in the structure of the Companies Act 2016 ('the Act') which prescribes the basic tenets that contribute to such a balance.

[6] Sections 75 and 85 of Part III entitled Management of Company in Division 1, Subdivision 1 provide for the allocation of powers between directors and shareholders on the issuance of new shares, and preemptive rights in relation to the same.

[7] In ensuring that a balance is struck between the competing interests of shareholders and directors in pursuing their business goals, s. 75(1)(a) of the Act prohibits the management of a company from exercising any power to allot shares in the company without the prior approval of the company in general meeting. Section 85 further safeguards shareholders' rights by providing pre-emption rights in relation to the issuance of new shares. However, this is subject to the constitution of the company.

[8] Section 85(1) of the Act reads:

> 85. Preemptive rights to new shares
>
> (1) **Subject to the constitution,** where a company issues shares which rank equally to existing shares as to voting or distribution rights, those shares shall first be offered to the holders of existing shares in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders. (emphasis added)

[9] In relation to regulating the management of a company, Division 2 Subdivision 3 of Part III demarcates the directors' duties and responsibilities in deciding on the strategic pathway for a company, including the pursuit of entrepreneurial goals, stipulating rules to regulate directors' decisions, acts and/or omissions.

[10] To give full effect to this balance as provided for in the Act, the correct legal construction or interpretation has to be accorded to the relevant statutory provisions regulating the interests of the shareholders on the one hand, and the directors and the company on the other. Any such interpretation should result in a reasonable, proportionate and harmonious construction to be afforded to the provisions of the Act, rather than

perpetuating a purpose different to, or conflicting with, the underlying intent of the Act. As such, a holistic and legally correct interpretation of the relevant statutory provisions of the Act comprises the crux of these appeals.

The Present Appeals

[11] In the present appeals, the proposed allotment and issuance of new shares put forward by directors of a company for the purposes of part-financing a business merger, *vide* the fusion of the company's subsidiary with a third party company, triggered litigation by dissenting shareholders, *albeit* after considerable delay. This came in the form of an oppression action brought by a dissenting minority shareholder of Apex Equity Holdings Berhad ('Apex Equity'), one Concrete Parade Sdn Bhd ('Concrete Parade'). Concrete Parade maintained that it had been oppressed by the proposed merger.

[12] In essence, Concrete Parade maintained that:

(i) its preemptive rights as a shareholder of Apex Equity under s. 85(1) of the Act had been adversely affected, and the said section contravened;

(ii) section 223 of the Act, relating to disposals or acquisitions of substantial assets of the company by the directors of Apex Equity, was contravened by the failure of the directors to procure shareholder approval for the proposed merger at the correct or relevant time alleged to be prescribed in that section;

and independently of these two grievances, that

(iii) share buy-back transactions undertaken by Apex Equity between 2005 and 2017, were *ultra vires* its articles of association ('A&A'). In this context, the acts of the management or directors of Apex Equity in seeking and obtaining an order of the High Court, validating the prior share buy-back transactions, without giving adequate notice to its shareholders amounted to an act of oppression.

[13] Ultimately, the proposed merger failed. The decision of the Court of Appeal in construing ss. 85 and 223 of the Act, in particular, which affected the viability of the proposed merger, comprise the subject matter of these appeals.

The Legal Issues In These Appeals

[14] Before us, the appellants put forward several questions of law relating to the preemptive rights of shareholders under s. 85 of the Act; and three questions relating to the relevant point in time when the law permits the directors of a company to procure shareholders' approval for the acquisition or disposal of the property or undertaking of a company under s. 223 of the Act.

[15] Accordingly, these appeals raise significant issues in relation to the construction of ss. 85 and 223 of the Act in the context of business mergers. A

[16] The appeals also require a consideration of whether share buy-back transactions conducted over several years in contravention of a condition stipulated in the Act amounted to an act of oppression *vis-à-vis* Concrete Parade. The issue of whether such contravention may be rectified under s. 582(3) of the Act also arose for consideration. B

What Is The Correct Legal Construction To Be Afforded To The Act?

[17] These appeals are of importance because of the implications to companies at large in this jurisdiction, on the permitted means of raising capital for entrepreneurial purposes. The allotment and issuance of new shares by a company to third parties by way of private placement for the purposes of raising capital, is, and has long been utilised as a mode of raising capital by companies, where the constitution allows it. C

[18] There is a balance to be achieved as borne out by the express words used in s. 85(1), namely 'subject to the constitution'. These words in the Act, accord recognition to the constitution of a company, as representing the contractual relationship bargained for and arrived at, between the various stakeholders in a company, delineating the relationship between the shareholders, directors and the company itself. D E

[19] As such, the legal issue that arises in these appeals is the construction to be accorded to s. 85 of the Act in the context of the balance to be achieved. Must shareholders' approval be obtained in every instance where newly issued shares are to be allotted and issued for the purposes of raising capital or do exemptions and exceptions subsist by virtue of the constitution of the company? If they do, can they be given effect? F

What Is The Correct Legal Construction To Be Afforded To Section 223 Of The Act?

[20] Secondly, the issue of the precise point in time when directors are to obtain shareholders' approval for the acquisition or disposal of an undertaking or property of a substantial value, in the context of s. 223 of the Act is another matter of pivotal significance, warranting analysis. This relates to the proper construction to be accorded to s. 223 of the Act. G

[21] A great deal of the argument and decision in the courts below turned on whether certain preparatory agreements to the merger had the effect of the directors causing Apex Equity to "enter or carry into effect any arrangement or transaction for the acquisition of an undertaking or property of a substantial value; or the disposal of a substantial portion of the company's undertaking or property" without previously obtaining shareholders' approval. H I

[22] The pivotal questions here include:

(i) how is s. 223(1)(b)(i), (ii) of the Act 2016 to be construed? This includes a consideration of the correct time when shareholders' approval is to be obtained. Prior to the entry into any negotiation at all, or upon some basic aspects of the merger being agreed upon in principle, and the entirety subject to shareholders' approval? In other words, does entry into an agreement setting out the proposed details of the merger but which is specifically subject to a series of conditions precedent requiring *inter alia*, shareholder approval, amount to entering into the merger or carrying into effect the merger?

(ii) how is the use of the word 'or' in s. 223 to be construed? Is it to be construed disjunctively or conjunctively? The Court of Appeal held that it was to be read conjunctively and this is a key issue that requires scrutiny; and

(iii) the answer to the last question defines the extent of the fetter placed on management/directors in relation to the acquisition or disposal of assets within a company. Is it open to directors to exercise their powers of management to expand the business of the company by negotiating and putting into writing conditional contracts which are subject to shareholders' approval, or are the directors constrained to revert to the general body of shareholders prior to entry into conditional contracts?

[23] These matters have a practical and substantive impact on the feasibility and viability of new business transactions for a company, which directors, exercising their entrepreneurial functions, seek to apply on a regular basis.

[24] Requiring the convening of general meetings to obtain shareholder approval for negotiation, even before clear or final terms for a proposed transaction have been negotiated, can be costly and time consuming, and can even result in the proposed transaction being aborted. On the other hand, the importance of ensuring that directors are not dissipating or acquiring assets without the full knowledge of the shareholders cannot be ignored.

Does A Contravention Of The Act (Which Concrete Parade Acquiesced To) In Relation To The Validation Of Share Buy-back Transactions Amount To An Act Of Oppression *Vis-Á-Vis* Concrete Parade?

Can Section 582(3) Be Utilised To Rectify Such A Contravention?

[25] The third legal issue in this appeal relates to whether the validation of a series of share buy-back transactions effected by Apex Equity (with shareholder approval) between 2005 and 2017 *vide* a validation order of the High Court on 29 August 2018 amounts to act/acts which are oppressive of Concrete Parade as a minority shareholder. The central complaint is that these transactions were effected when the AA (now the constitution) of the company did not provide or allow for any such buy-back transactions.

[26] The appellants also maintain that s. 582(3) of the Act may be utilised to rectify the unknowing contravention of the Companies Act.

The Utilisation By Concrete Parade Of The Statutory Oppression Provisions Under Section 346 Of The Act

[27] The fourth legal issue that warrants consideration is whether the use of the oppression provision is indeed the proper means of remedying Concrete Parade's grievances, if such grievances are made out.

[28] The relationship between shareholders and directors is analogous to that of principal and agent. The disputes that arise in core company law between shareholders and management/directors, may conveniently be divided into three categories:

(i) disputes arising between the management or directors and the shareholders as a class;

(ii) disputes arising between majority shareholders and minority shareholders; and

(iii) disputes arising between the controllers of the company (whether directors or majority shareholders) and non-shareholder stakeholders.

[29] The instant case is premised on an oppression action and relates to the second category in that the basis of such a claim is oppression by the majority over the minority. In this context, it is also relevant that this is a public listed company.

[30] The primary bone of contention of Concrete Parade here, is that the management or directors have contravened several statutory provisions of the Act as outlined above. These acts or omissions comprise the basis for the oppression action. Such contraventions, if true, beg the question whether they affect the shareholders as a class, in which case it is moot whether the grievances should fall within the first category, or the second category, namely oppression, as the respondent has done. In short, what is the proper classification for these complaints?

[31] Secondly, has Concrete Parade established how it has suffered in its capacity as a shareholder as a consequence of the action of the majority shareholders? More particularly, in a public listed company where the majority of shareholders at general meeting voted in favour of the proposed merger?

[32] Is the primary complaint of contraventions, if established, more properly brought against the acts of the management or directors in relation to the business merger, or do such alleged contraventions amount to acts of oppression by the majority shareholder against Concrete Parade itself as a dissenting minority shareholder? In this context, the primary complaint appears to be centred against the acts and/or omissions of the directors.

[33] This issue ultimately also falls for consideration, in order to assess whether the Court of Appeal was correct in concluding that Concrete Parade, as a minority dissenting shareholder of Apex Equity, suffered oppression perpetrated by the wrongful acts of the majority, as envisaged under s. 346 of the Act.

Salient Facts

[34] The salient facts may be gleaned from the submissions of parties and the judgments of the courts below which we utilise here.

[35] Apex Equity is a public listed company. JF Apex Securities Bhd ('JF Apex'), also a public listed company, is a wholly owned subsidiary of Apex Equity. It is engaged in the stockbroking business and is the holder of a licence issued under the Capital Markets and Services Act 2007 ('CMSA').

The Proposed Merger

[36] A business merger was planned which involved the amalgamation of the stockbroking business of JF Apex and one Mercury Securities Sdn Bhd ('Mercury') which was also engaged in the stockbroking and corporate advisory business.

[37] It was intended that Mercury would transfer its stockbroking business to JF Apex. The merger would result in Mercury being absorbed into, or merged with JF Apex. The licence, assets and liabilities of Mercury would be merged with JF Apex. The new merged entity would see a change in controller and in its shareholding.

APEX EQUITY

Consideration provided by Apex Equity for the merger between its wholly owned subsidiary JF Apex and Mercury

as shown below.

Consideration = RM140 million payable in cash and issuance of new shares; 100 million new shares in Apex Equity; and part payment of the cash consideration *via* issuance of new shares for private placement

Mercury merges with JF Apex

Consideration For The Proposed Merger

[38] The consideration for the transfer of Mercury's stockbroking business to JF Apex was a sum of RM140 million to be effected by Apex Equity in the following manner:

(i) a first tranche of RM22 million in cash;

(ii) a second tranche of RM92 million in kind by the allotment and issuance of 100 million new ordinary shares in Apex Equity representing approximately 31% of the total enlarged issued share capital of Apex Equity at the relevant time, which was to be credited as fully paid to Mercury ('consideration shares');

(iii) a third tranche of RM26 million in cash; and

(iv) Apex Equity was to fund part of the cash portion of the consideration by issuing 20 million new ordinary shares representing approximately 10% of the total existing issued share capital of Apex Equity, by way of a private placement for subscription by any independent third parties ('proposed private placement').

Conditions Precedent To The Merger

[39] The proposed merger as outlined above was conditional upon several conditions being met:

(i) the approval of the shareholders of Apex for the proposed merger including the proposed private placement ('shareholders' approval'). This is of primary relevance in relation to the construction of s. 223 of the CA;

(ii) the proposed merger was inter-conditional with the proposed private placement and if the latter was aborted or terminated, then the proposed business merger agreement (yet to come into effect) would be rescinded or terminated;

(iii) the approval of Bursa Malaysia Securities Berhad for the listing of and quotation for the new shares of Apex Equity to be issued for the proposed merger (including the consideration shares and the proposed private placement shares). Such approval was procured;

(iv) the approval of the Securities Commission being obtained for the change of controller of JF Apex, pursuant to the proposed merger; the variation of the licences held by the relevant companies to carry out their respective businesses; the assignment or transfer of the relevant licenses *etc* held by Mercury and/or officers of Mercury in order to enable them to carry out their businesses in the new merged entity; and

(v) the procurement of a vesting order from the High Court in Malaysia pursuant to the CMSA and other relevant law to give effect to the transfer of the business, business assets and business liabilities of Mercury to JF Apex.

[40] These essential matters were put into writing in a document entitled the Heads of Agreement ('HOA'), executed by Apex Equity and Mercury only, on 21 September 2018.

[41] It is pertinent that JF Apex did not execute the HOA, although it comprises the primary entity in the proposed business merger between the two entities. Apex Equity provided the consideration as set out above for the merger.

[42] The HOA specifically stipulates that its objective is to set out the mutual understanding of the parties and the essentials of the proposed merger with the further goal of entering into a business merger agreement.

[43] It is evident from a reading of the HOA that one would be hard put to construe it as having the effect of transferring any assets, or carrying into effect the actual merger. This is because it is only between Apex Equity and Mercury. JF Apex as stated before, which is the primary entity required for the proposed merger, is not party to the HOA.

[44] Further, there are express conditions precedent to be fulfilled, one of the primary such conditions being the procurement of the approval of the shareholders of Apex Equity at general meeting. This is evident in the HOA at p. 2 of the agreement and stipulates as follows:

> The obligations of the parties to complete the transaction contemplated herein are conditional upon the following conditions ("Conditions Precedent") being fulfilled within four (4) months from the date of the Agreement (or such later date as may be mutually agreed between the parties:
>
> (a) The approval of the shareholders of the PLC for the transaction contemplated in the Agreement being obtained (including, without limitation for the Proposed Private Placement ("PLC Shareholders Approval");
>
> (b) The approval of the shareholders of the Company for the Proposed Merger;
>
> (c) …
>
> (d) …

[45] (However despite this clear provision, the Court of Appeal found that the foregoing did not amount to a condition precedent because it was one of the salient terms to be inserted in a proposed Business Merger Agreement.)

[46] It is not legally tenable to construe conditions precedent as being anything other than what they state, and their actual effect. A condition precedent requires that certain matters be fulfilled before the proposed transaction can proceed further. If that condition is not met, it follows that the transaction cannot proceed further. It is, simply put, a "subject to" requirement, failing which the proposed merger or transaction ends.

The Business Merger Agreement Dated 18 December 2018

[47] The Business Merger Agreement ('BMA') was executed on 18 December 2018, some three months after the HOA.

[48] The BMA is a tripartite agreement between Apex Equity, JF Apex and Mercury.

[49] Again the objective here is clearly stated to be for the parties to document the relevant terms and conditions of a proposed merger where Mercury transfers its entire business to JF Apex together with its assets and

liabilities. The consideration for such transfer by Mercury of its stockbroking and corporate advisory business is provided by Apex Equity as set out earlier.

[50] This is important in order to assess whether the effect of the BMA is to actually perform, accomplish or bring about the merger, or whether such performance, accomplishment or achievement of the merger is subject to other conditions. If it is the former then it may trigger the 'entry into or carrying into effect' the proposed merger. If it is the latter then, the BMA in itself cannot have the effect of triggering an 'entry into or carrying into effect' of the proposed merger.

[51] A perusal of the BMA discloses that it sets out in considerably greater detail than the HOA the particulars of the proposed merger. It incorporates all the three relevant entities involved in the proposed merger. It also supersedes the HOA expressly. Of importance here are the following clauses.

(i) clause 5 which deals with Conditions Precedent; and

(ii) clause 5.1 stipulates that the obligations of the three parties to complete the transfer of the business of Mercury to JF Apex is conditional upon the approval of the shareholders of Apex and JF Apex for the proposed merger including the private placement. This latter relates to the approval of Apex Equity's shareholders only.

[52] As the very document which sets out the terms of the proposed merger and the consideration for the same, stipulates expressly that neither the entry into an arrangement or transaction nor the carrying into effect of such transaction by the transfer of business can take place until shareholders' approval is obtained, it is somewhat perplexing to comprehend legally, how the BMA which contains this condition precedent, can be said to amount to either an 'entering into an arrangement or transaction for either the acquisition of an undertaking or property, or the disposal of a substantial portion of the company's undertaking or property', as envisaged in s. 223(1)(a) or (b) of the Act. The entering into or carrying into effect of an arrangement or transaction for the acquisition of property, can only take effect:

(i) if the subject property is effectively acquired upon the signing or execution of the BMA; and

(ii) if such acquisition is subject to several conditions, the chief amongst them being the procurement of shareholders' approval, then how can a transfer of ownership in the subject property be effected? The conditions necessary to allow for such transfer have not been met.

[53] Instead a more coherent legal argument is that prior to such approval being obtained, there can only be a proposal to enter into a transaction or arrangement for either the acquisition or disposal of an undertaking or property.

[54] The general position in law is that an entity that has executed such a conditional agreement, where the condition precedent is decisive of the viability of the agreement, cannot effect an acquisition through a change in ownership which is binding, simply because it is conditional and not final. The entire enterprise fails if the conditions are not met.

[55] Other sub-clauses in clause 5 of the BMA provided for further conditions to be met, including the obtaining of a vesting order, approval from Bursa Securities and the Securities Commission Malaysia to be obtained prior to the entire BMA becoming unconditional. If any of the conditions set out in clause 5.1 of the BMA remained unfulfilled within period stipulated, then it was open to any one of the three parties to terminate the entire agreement. This meant that the merger could not proceed.

The Approvals

[56] In summary the proposed merger was conditional upon a series of approvals, namely:

(i) approval by the regulatory authorities, namely the Securities Commission and Bursa;

(ii) approval by the shareholders; and

(iii) a vesting order from the High Court pursuant to s. 139 of the CMSA to effect the transfer of the business assets and liabilities.

Subscription Agreements For The Private Placements And Company Announcement

[57] On the same day, 18 December 2018, eight separate conditional subscription agreements for the private placements were executed which would also require shareholders' approval. It should be noted that the subscription agreements were made expressly conditional upon the fulfilment of all the other conditions precedent under the BMA.

[58] An announcement was made on the same day for the proposed merger and private placements. It was therefore public knowledge that such private placement agreements were for the purposes of raising capital for the part-financing of the business merger.

Concrete Parade's Oppression Suit (OS 56)

[59] On or about 20 February 2019, some two months after the announcement, Concrete Parade filed OS 56 pursuant to s. 346 of the Act. As stated before, Concrete Parade sought *vide* the oppression action to achieve the following:

(i) render the share buyback transactions a nullity and set aside the validation order; and

(ii) invalidate the HOA, the BMA and the subscription agreements for the private placements.

[60] This would effectively defeat/extinguish the proposed business merger.

The SC Approval

[61] Pending the disposal of OS 56, JF Apex applied for the change of controller as required under the licensing requirements.

[62] By a letter dated 21 February 2019, the SC granted the approval for change of controller of JF Apex and the variation of the licenses to include the approved regulated activities of Mercury together with an assignment or transfer of the relevant licenses originally held by Mercury.

[63] Also pending the disposal of the oppression action, the proposed merger and the private placement were approved by the shareholders of Apex Equity at an Extraordinary General Meeting No. 1 on 19 June 2019 ("EGM No. 1"). The outcome of the meeting reported that the ordinary resolutions for the proposed merger and proposed private placement as set out in the Notice of EGM of 3 June 2019 were duly passed by the shareholders of Apex Equity in the following ratio:

(i) 54.7 per cent of the shareholders voted in favour of the resolutions while 45.2 per cent voted against the resolutions.

[64] At the EGM, several representatives of the shareholders raised issues. Of relevance here is the discussion relating to the private placements. The issue of why the board of directors of Apex Equity had opted for a private placement exercise to raise funds rather than by way of a rights issue was debated. The professional advisor explained why the board had opted for private placement and this related largely to the issues of delay and certainty of funds.

[65] Perhaps more significantly, one Mr. Owee representing Concrete Parade raised the issue of whether full information had been disclosed to the shareholders so that they could make an informed decision. Section 85 of the Act relating to preemptive rights was also raised with a specific question being put to the effect as to why the shareholders' preemptive rights were not met by offering the proposed new issue of shares to them rather than by way of subscription to the places. Reference was made to article 11 of the AA of Apex Equity. It was further queried by Mr Owee whether a resolution had been passed by the company by the shareholders to 'waive' that pre emptive right.

[66] The legal counsel for Apex Equity explained that the meeting was precisely for that purpose, namely whether to approve the private placement or not.

[67] If indeed the shareholders were intent on exercising their preemptive rights by way of a rights issue rather than a private placement, the voting would have reflected this. The objection put forward by Concrete Parade was that there should have been a resolution specifically asking the shareholders to waive their preemptive rights before the private placement could be approved. It insisted that article 11 ought to have been specified in the circular and that the said resolution ought to have been passed first.

[68] The point to be gleaned here is that there was a full discussion of the rights of pre-emption in relation to the proposed newly issued shares for the private placement only. It is interesting that there was no issue in relation to the issuance of the far larger 'consideration shares'.

[69] After this debate on preemptive rights and the proposed issuance of shares for private placement rather than a rights issue, with all shareholders present and voting, a decision was taken by the shareholders to approve the resolution for the private placement.

[70] As such the shareholders were specifically made aware of their rights of pre-emption under s. 85 of the CA, article 11 was mentioned and notwithstanding this, the general body of shareholders by majority decided to approve the resolutions. In these circumstances can it be said that the shareholders were unaware of the preemptive rights?

[71] Can it be said that the approval for the private placement resolution did NOT amount to a clear 'direction to the contrary' as envisaged under article 11?

[72] Both questions warrant an answer in the negative.

The Vesting Order

[73] Following the approval obtained at EGM No. 1 and pursuant to the condition precedents contained in the BMA, on 27 June 2019, Mercury and JF Apex made a joint application to the High Court *via* KL High Court Originating Summons No. WA-24NCC-345-06-2019 ("OS 345") under s. 139 of the CMSA. The vesting order was granted by the High Court on 1 July 2019.

[74] The vesting order was, however, subsequently set aside by the High Court on 15 July 2019 on the application of another shareholder, Pine Rains on the basis that the circular did not disclose adequate information.

[75] Notwithstanding this finding the High Court did not dismiss the application for a vesting order outright on the basis that Apex Equity was entitled to hold another EGM to obtain the requisite approval of its shareholders, after which it could rightfully apply for a fresh vesting order. This gave rise to the second EGM which was held on 18 November 2019 ('EGM No. 2').

The Decision Of The High Court In Relation To Concrete Parade's Oppression Action In Originating Summons No. 56 – (Dismissal Of OS 56)

[76] Prior to this, Concrete Parade's claim for oppression in OS 56 had been dismissed by the High Court on 7 August 2019 on the following grounds:

(i) **The Share Buy-back Ground**

The High Court Judge conceded that Concrete Parade may have been deprived of an opportunity to raise objections at the validation proceedings. However, the Court reasoned that none of Concrete Parade's rights as shareholder of Apex Equity was materially prejudiced. Accordingly there was no basis to claim oppression under this head;

(ii) **Alleged Contravention Of The Preemptive Rights Of The Shareholders Of Apex Equity (s. 85 Of The Act)**

(a) the High Court found that there was no contravention of Concrete Parade's rights of pre-emption as the proposed private placement had been approved by the shareholders of Apex Equity at EGM No. 1;

(b) the High Court further held that it was not necessary for the circular to the shareholders to expressly specify that the approving of the proposed merger with Mercury would amount to a waiver of their preemptive rights because any reasonable incumbent shareholder would have understood that a private placement would necessarily have the effect of diluting that shareholders' interests;

(iii) **Alleged Contravention Of s. 223 Of The Act**

(a) the High Court held that there was no contravention of s. 223 under the HOA even though it was expressed to be legally binding. This is because on a perusal of the agreement, which was in any event only between Apex Equity and Mercury, the HOA did not have the effect of committing the parties to a sale and purchase of the business;

(b) even if the HOA contravened s. 223, it had been superseded by the BMA, which in turn was made subject to shareholders' approval and hence in compliance with s. 223(1) of the Act;

(iv) **Oppression**

In all circumstances, the High Court ruled that Concrete Parade had not demonstrated any prejudice to its rights as shareholder in order to avail itself of the remedies under s. 346 of the Act.

[77] Concrete Parade appealed against the decision of the High Court.

Events Prior To The Disposal Of The Appeal: EGM No. 2

[78] In view of the setting aside of the vesting order as explained above, Apex Equity called for another shareholders' meeting to seek approval for the proposed merger of Mercury with JF Apex. The notice of EGM was accompanied by a fresh circular outlining the details, rationale and justification for the proposed merger and private placement. Approval was obtained for a second time on 18 November 2019.

Stay Of The Vesting Proceedings OS 345

[79] By way of a notice of motion dated 7 November 2019, Concrete Parade obtained a stay of proceedings of the vesting order proceeding in OS 345 pending the disposal of its appeal against the decision of the High Court relating to its oppression action in Appeal 1551.

Discontinuance Of The Mercury Merger

[80] Concrete Parade's appeal against the dismissal of its oppression action was heard over a period of 14 months. Meanwhile, on 15 April 2021, Mercury decided not to extend the completion of the BMA and all other related agreements ceased to have effect on 16 April 2021 due to the non-fulfilment of the conditions, precedent within the mutually agreed timeline. In short, the Mercury merger was discontinued. On 16 April 2021, Apex Equity announced the discontinuance to Bursa Malaysia.

[81] It can therefore be said that the proposed merger was effectively halted by reason of the oppression action brought by Concrete Parade which maintained that it had been oppressed by the merger.

[82] On 18 August 2021, the Court of Appeal delivered its decision reversing the decision of the High Court. As stated above the merger had, by this date, been abandoned.

[83] This then comprises a sequence of the events leading up to this litigation.

Leave To Appeal To The Federal Court And Questions Of Law For The Consideration Of This Court

[84] Pursuant to the decision of the Court of Appeal, the appellants in this appeal sought leave which was granted on 10 August 2022. The following questions of law were put forward for our consideration which we shall consider in categories in the course of the judgment:

(A) – Section 223 Of The Companies Act 2016

(i) Where a company enters into any arrangement or transaction falling within s. 223 of the Companies Act 2016 ("CA 2016"):

(a) Can s. 223(1)(b)(i) and (ii) of the CA 2016 be read disjunctively, such that it is sufficient if either:

(1) the agreements relating to the arrangement or transaction are expressly made subject to the approval of the company by way of a resolution; or

(2) the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution?

(ii) where two or more agreements are construed as forming one composite transaction constituting an arrangement or transaction falling within s. 223 of the CA 2016 for the acquisition or disposal by a company of substantial property, then:

(a) would s. 223(1)(b)(i) of the CA 2016 be satisfied if at least on condition precedent requiring a resolution of the shareholders of the company for the said arrangement or transaction?

(b) would s. 223(1)(b)(ii) of the CA 2016 be satisfied by the passing of a resolution of the company in a general meeting approving the said arrangement or transaction before the arrangement or transaction becomes unconditional and binding on the parties to the arrangement or transaction and is carried into effect?

(iii) does s. 223(1)(b) of the CA 2016 impose an "incumbent duty on the directors to inform shareholders" of any intention to 'enter into' and/or 'carry into effect' an acquisition or disposal of substantial assets of a company" based on the decisions in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616 and *Smithton Ltd (Formerly Hobart Capital Markets Ltd) v. Naggar* [2015] 1 WLR 189?

(B) – Section 85 of the Companies Act 2016

(iv) where the constitution of a company provides that shareholders' preemptive rights under s. 85 of the CA 2016 is "subject to any directions to the contrary that may be given by the company in a general meeting", whether:

(a) this allows shareholders at a general meeting to waive such preemptive rights in full; and not just the manner and proportion in which shares are to be offered to existing shareholders?

(b) if the answer to question 4(a) is in the affirmative, whether a proposed resolution for the allotment and issuance of new ordinary shares to persons other than existing shareholders must expressly state: (1) shareholders have preemptive rights under s. 85 of the CA 2016; and (2) passing of the proposed resolution amounts to a waiver of those rights, for the resolution to constitute a valid waiver of preemptive rights?

A (c) an agreement between the company and persons other than existing shareholders for the allotment and issuance of new ordinary shares ("subscription agreement") infringes s. 85 of the CA 2016 even though:

B (1) the subscription agreement is conditional on shareholders' approval in a general meeting; and

(2) shareholders' approval in a general meeting was obtained before any allotment and issuance of the shares?

(C) – Section 582 of the Companies Act 2016

C (v) where a public listed company whose shares are quoted on the stock exchange purchases its own shares though not authorised by its constitution, whether the court may validate the purchases under s. 582(3) Companies Act 2016 (s. 355(3) of the Companies Act 1965), irrespective of whether the company's constitution has since been D amended to authorise it to purchase its own shares?

(vi) if the answer to question (v) is in the affirmative, whether the approval, consent or authority of the shareholders of a public listed company is required before the company can initiate validation proceedings under E s. 582(3) of the Companies Act 2016 (s. 355(3) of the Companies Act 1965) to validate the said purchase of shares?

(D) – Oppression

(vii) whether, in an application under s. 346 of the CA 2016, the court may make a finding that the affairs of a public-listed company have been F conducted oppressively by the directors on the basis that there has been a denial of a shareholder's statutory right to vote on any arrangement or transaction or other corporate exercise requiring shareholder approval by law when:

G (a) all shareholders were given the opportunity to vote before the arrangement or transaction or corporate exercise in question became legally binding and effective;

(b) the shareholders of the company in general meeting had voted to approve the arrangement or transaction or corporate exercise in H question, and

(c) the shareholders who voted in favour of the arrangement or transaction or corporate exercise were not made parties to the oppression proceedings against the company and its directors?

I **Section 85(1) The Act**

[85] We turn to the first issue relating to s. 85(1) of the Act, in order to ascertain whether the events underlying these appeals, as set out above, amounted to a contravention of s. 85(1) of the Act.

[86] The question of law in relation to s. 85(1) is question (iv):

Where the constitution of a company provides that shareholders' preemptive rights under section 85 CA 2016 is "Subject to direction to the contrary that may be given by the company in general meeting, whether

(a) This allows shareholders at a general meeting to waive such preemptive rights in full; and not just the manner and proportion in which shares are to be offered to existing shareholders?

(b) If the answer to Question 4(a) is in the affirmative, whether a proposed resolution for the allotment and issuance of new ordinary shares to persons other than existing shareholders must expressly state:

(i) shareholders have preemptive rights under section 85 of the CA 2016;

(ii) passing of the proposed resolution amounts to a waiver of those rights, for the resolution to constitute a valid waiver of preemptive rights?

(c) Whether an agreement between the company and persons other than existing shareholders for the allotment and issuance of new ordinary shares ("subscription agreement") infringes section 85 CA 2016 even though

(i) The subscription agreement is conditional on shareholders' approval in a general meeting; and

(ii) Shareholders approval in a general meeting was obtained before any allotment and issuance of the shares

[87] In order to examine this issue and answer the question comprehensively at this appellate stage, a consideration of the decisions of the courts below is the proper starting point.

The Decision Of The High Court On s. 85 And Shareholders' Preemptive Rights In Relation To The Proposed Allocation And Issuance Of Placement Shares To Third Parties

[88] The High Court held that there was no contravention of s. 85(1) in relation to the shareholders' preemptive rights for the following reasons:

(i) the proposed placement was approved by the shareholders of Apex Equity at its general meeting held on 19 June 2019 and 18 November 2019. This meant that the shareholders comprehended and relinquished/surrendered their preemptive rights in favour of the private placement to facilitate the raising of capital for the proposed business merger pursuant to which Mercury would be acquired by Apex Equity; and

(ii) the failure to utilise express words to denote the ceding or renunciation of their preemptive rights in respect of the private placement shares could not amount to oppressive conduct as it was made reasonably clear

to the shareholders of Apex Equity *vide* the circular which explained the proposed merger. Any reasonable incumbent shareholder would have understood that a private placement would necessarily have the effect of diluting their interests as shareholders in Apex Equity.

The Decision Of The Court Of Appeal On Section 85(1) Of The Act

[89] The Court of Appeal reversed the decision of the High Court, holding that Concrete Parade had a legal right, both statutory and contractual, to be offered new shares in Apex Equity, prior to the proposed issue being offered to third party places. That right could only be denied if there was 'direction to the contrary' given during a general meeting before such shares were offered to outsiders.

[90] In this context, the Court of Appeal held that the placement resolution could not constitute a valid 'direction to the contrary' because:

(i) such a direction had mandatorily to be obtained before the offer of any shares to outsiders. As the resolution was passed after the execution of the subscription agreements conditionally offering placement shares to the third parties, the direction could not be construed to be operative retrospectively. This amounted to a violation of the law;

(ii) further, in order to be in compliance with the law, the proposed resolution had to expressly set out the shareholders' preemptive rights under s. 85(1) and the consequences of the ceding of such preemptive rights in full; and

(iii) the Court of Appeal also referred to, and followed a decision of the Indian High Court in *Shanti Prasad Jain v. Kalinga Tubes Ltd & Others* [1952] 49 AIR 202 where it was held that the Indian statutory provision which contained the term "subject to any directions to the contrary" (which is found in article 11 of the constitution of Apex Equity) was held to refer only to the manner and proportion in which the new shares proposed to be issued have to be offered to the existing shareholders and could not mean any direction not to offer at all to existing shareholders. In other words the preemptive right of existing shareholders was found to be mandatory and not capable of being renounced.

The Parties' Submissions On Section 85 Of The Act

[91] The appellants and Mercury were consonant in their submissions. These parties submitted that s. 85(1) of the Act is engaged by the issuance and not the offer of shares. Further, they submitted as the subscription agreements were conditional contracts, the offers were, at best, conditional offers and as such could not infringe s. 85(1). The agreements would only become unconditional upon the approval of shareholders being obtained at general meeting.

[92] It was further submitted that s. 85(1) operates as a default provision where a company does not have a constitution or the constitution is silent on preemptive rights. Here however, article 11 of the AA of Apex Equity gave a general mandate for Apex Equity to disapply the preemptive rights by way of a resolution at general meeting, to that effect.

[93] In relation to the issue of 'waiver' or concession or disapplication of preemptive rights, the parties maintained that the respondent was fully aware of the preemptive rights as the oppression claim in OS 56 was filed prior to the first EGM. The parties submitted that the High Court had correctly held that a reasonable shareholder could not have failed to comprehend the dilutive effects of the private placement.

[94] Concrete Parade in response submitted that pre emptive rights are not predicated upon allotment. They submitted that reading s. 85(1) and article 11 together means that existing shareholders must first be offered shares prior to any offer being made to any third party. In the instant case Concrete Parade maintained that s. 85(1) was contravened because the HOA, BMA and subscription agreements were entered into without shareholders' approval.

[95] Further it submitted that there was no question of 'waiver' of such rights because the shareholders had no knowledge of their rights under s. 85(1) as it was not expressly stipulated during the EGMs.

[96] In relation to the construction of s. 85(1), Concrete Parade submitted that the words 'subject to the constitution' cannot be construed to oust the preemptive rights of shareholders otherwise contained in s. 85 altogether. It was further contended that a preemptive right is a proprietary right belonging to each individual shareholder which cannot be taken away by a majority vote or displaced completely.

Our Analysis

The Law

[97] The central issue at the heart of the various matters raised in question (iv) relate to the proper construction to be accorded to s. 85(1) which, for ease of reference is reproduced again:

> **Subject to the constitution, where a company issues shares** which rank equally to existing shares as to voting or distribution rights, **those shares shall first be offered to the holders of existing shares** in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders. (emphasis added)

[98] To comprehend how this section operates within the context of the Act, it is necessary to undertake an exercise in statutory interpretation.

[99] As with all statutory interpretation in this jurisdiction, the preferred mode of interpretation is the purposive approach, which seeks to determine the underlying intent of the Act. This approach is encapsulated in statutory form by s. 17A of the Interpretation Acts 1948 and 1967:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[100] See also *Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain* [2022] 4 CLJ 657; [2022] 3 MLJ 450 at paras. 50 and 51; *Tan Kah Fatt & Anor v. Tan Ying* [2023] 2 CLJ 169; [2023] 2 MLJ 58 at para. 49; *Perbadanan Pengurusan Sunrise Garden Kondominium v. Sunway City (Penang) Sdn Bhd & Ors And Another Appeal* [2023] 2 CLJ 333; [2023] 2 MLJ 621 at para. 140.

[101] It is not instructive to construe s. 85(1) *in vacuo*. As stated at the outset, the statutory position relating to shareholders' rights of pre-emption to newly issued shares and the law relating to management's exercise of powers to allot and issue shares and the exemptions thereto, are set out in ss. 85 and 75 of Part III entitled Management of Company in Division 1, Subdivision 1. Any interpretation of s. 85(1) ought therefore to be construed in the context of its associated provisions and not in isolation.

The Legislative History Of Shareholders' Pre-Emption Rights

[102] In order to comprehend the legislative purpose of these statutory provisions relating to preemptive rights, it is useful to study the legislative history preceding the introduction of s. 85 of the Act. In this context, the article entitled *"Shareholders' Pre-Emption Rights to New Shares – The Legislative and Regulatory Scheme"* by Dato' Loh Siew Cheang and Ms Goh Ee Von in Malayan Law Articles [2022] 4 MLJ lxiv provides, with respect, a scholarly and comprehensive analysis of the law.

[103] The article was also referred to and recommended by learned *amicus curiae* in these proceedings, Mr Philip Koh, in the course of submissions. The article is of great assistance in tracing the legislative history relating to shareholders' pre emptive rights, as well as underscoring the importance of relating the statutory provisions dealing with such rights, with the requirements stipulated in the CMSA and requirement 7.08 of the Main Market Listing Requirements ('MMLR'). These are essential statutory provisions and guidelines that require mandatory compliance in corporate transactions such as business mergers, and is therefore of significance in the current context.

Legislative History Preceding Section 85 Of The Act

[104] In legislation preceding the Act, there was no statutory provision relating to shareholders' preemptive rights. Neither the Companies Ordinance 1940 nor the Act 1965 ('CA 1965') provided any preemption rights to existing shareholders in respect of a new issue of shares.

[105] Accordingly, preemptive rights under the preceding legislation was contractual in nature, between: A

(i) shareholders and those in management *ie*, the directors, who represented the company; and

(ii) shareholders *inter se*. B

[106] The directors of a company were accorded the power to allot shares as provided for in the memorandum and articles of the company (now the constitution). Such rights of allotment and issuance on the part of the directors, emanated from the directors' general powers of management as contained in a company's AA. C

[107] The directors were expected to exercise this power of allotment and issuance *bona fide*, for proper purposes and in good faith. (see *Hogg v. Cramphorn Ltd.* [1967] Ch 254, *Howard Smith Ltd v. Ampol Petroleum Ltd & Ors* [1974] AC 821)[1]. D

[108] In the Company Ordinance 1940, pre-emption rights appeared as reg. 35 in the model articles in the First Schedule, Table A. And in the CA 1965, these rights appeared as reg. 41 in the model articles in the Fourth Schedule, Table A. Regulation 41 provided in its opening words:

> Subject to any direction to the contrary that may be given by the company in general meeting … E

[109] And went on to preserve shareholders' rights of preemption to newly issued shares.

[110] It is notable that the content of reg. 41 of the model article in Table A in the repealed Act is identical to that in article 11 of Apex Equity's constitution. F

[111] Where reg. 41 was adopted as an article under the CA 1965, as is the case with Apex Equity, it operated *inter se* as a contractual term between the company and its shareholders and the shareholders *inter se*. G

[112] In short, such preemption rights were a matter to be determined and governed domestically between the company and its members, as well as the members *inter se*. This then became a matter of the shareholders crafting the precise nature of such rights and negotiating for the requisite degree of preemption rights they wanted. H

[113] Next, came some degree of statutory control in relation to the power of directors to issue shares in the form of s. 132D of the CA 1965. This statutory provision regulated the directors' power of issuance of shares by precluding them from exercising such power without the prior approval of the company in general meeting, subject to an exception in s. 132D(6A). That exception operated to exempt directors from procuring such approval of shareholders where the issuance of shares was consideration or part I

consideration for the acquisition of assets by the company. That is precisely the situation in the present appeal, as the proposed issuance of the private placement shares was to provide part consideration for the acquisition of Mercury by Apex Equity *vide* JF Apex.

[114] And s. 132D(6A) has now become the new s. 75(2)(d) of the Act.

[115] In relation to public listed companies, the MMLR incorporated reg. 41 in the articles of association of all such companies *vide* requirement 7.08 of the MMLR. As explained earlier, the MMLR are statutory guidelines imposed by the SC in relation to public listed companies, pursuant to s. 377 of the CMSA. Requirement 7.08 reads as follows:

> **Subject to any direction to the contrary that may be given by the company in general meeting,** all new shares or other convertible securities shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion as nearly as the circumstances admit, to the amount of the existing shares or securities to which they are entitled. The offer shall be made by notice specifying the number of shares or securities offered, and limiting a time within which the offer, if not accepted will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares or securities offered, the directors may dispose of those shares or securities in such manner as they think most beneficial to the company. The directors may likewise also dispose of any new share or security which (by reason of the ratio which the new shares or securities bear to shares or securities held by persons entitled to an offer of new share. (emphasis added)

[116] This explains why article 11 is so worded and incorporated in the constitution of Apex Equity.

[117] It also follows that the directors under the CA 1965 did not require the approval of the shareholders in general meeting to issue and allot shares under s. 132(D) where it was for consideration other than in cash. Where the purpose of such issuance and allotment was for the purposes of acquisition of assets as envisaged in the exception in s. 132D(6A) the preemptive right of shareholders in article 41 as mirrored in reg. 7.08 of the MMLR were simply inapplicable.

[118] Shareholders' rights were further protected *vide* regulation of directors' powers under the then s. 223(1) in relation to acquisitions of assets of a substantial value as defined there.

The Act

[119] The Act introduced legislative changes. The earlier s. 132D became ss. 75 and 76. Directors' powers of allotment were governed by these sections. While s. 75(1) provided that prior approval of shareholders was

required before directors could exercise the power of issuance and allotment, s. 75(2) provided a range of exceptions or exemptions. This latter section had the effect of amplifying the exceptions to issuance and allotment compared to the earlier s. 132D(6A). Under the Act, s. 75(2) covers a rights' issue, bonus issue of shares to members, allotment of share to a promoter of a company; or as in the instant case, shares which are to be issued as consideration or part consideration for the acquisition of shares or assets by the company, provided members have been notified of the intention to issue the shares at least 14 days prior to such issuance.

[120] What transpires from the foregoing is that the present Act not only expands the ambit of power of the directors in relation to the issuance of shares, but specifically provides for such an exemption where the issuance is part consideration for the acquisition of an asset, like Mercury in the current appeal.

[121] As for s. 85(1) of the Act, it essentially grants a statutory privilege to existing shareholders of a company, allowing them to maintain their proportional ownership in the company by providing them with the opportunity to purchase shares on a *pro-rata* basis before they are issued to outsiders. This preemptive right however, as is evident from even a cursory reading of the section, is subject to the constitution of the company.

[122] In other words, the constitution of the company will have a determinative effect on whether and how the shareholders' statutory preemptive rights in the second part of s. 85(1) may be dealt with. The constitution may provide for an ability to renounce or disapply such preemptive rights or may be silent or may fortify such preemptive rights.

How Are Sections 75 And 85 To Be Construed?

[123] Given the existence of s. 75(1) and (2) how are these provisions to be read together with s. 85(1) of the Act?

[124] Section 75 deals with the power of directors to allot shares or grant rights and sub-s. 1 mandatorily requires the prior approval by way of resolution by the company before the directors can exercise their powers of management to proceed with allotment.

[125] However s. 75(2) specifies the exemptions to the exercise of directors' powers of allotment and issuance. Of relevance here is s. 75(2) which exempts the requirement for approval by way of resolution at general meeting in relation to shares proposed to be issued for the purposes of consideration, or part consideration, for the acquisition of shares or assets by the company. It also details the conditions which the directors have to comply with. in order to allow for such issuance.

[126] In short, where the purpose of exercise of management powers is to finance or part finance an acquisition of shares or an asset, there is no necessity for a general meeting to be called, under s. 75(2). However, the

directors are required to ensure that members of the company are notified of the intention to issue shares by issuing a statement explaining the purpose of the proposed issue to every member as well as advertising the same in the newspapers in the national language as well as English.

[127] How then does this sit with s. 85(1) which stipulates that subject to the constitution all shareholders are entitled to be first offered newly issued shares? How is this read with s. 75(2)?

[128] It should be emphasised that while s. 85(1) is not subject to s. 75, these two provisions under this part of the Act, deal with different aspects of the allotment and issuance of new shares.

[129] Allotment and issuance may be differentiated. The parties in their submissions did so, drawing the distinction between the terms 'offer', 'allotment' and 'issuance' of shares. In *National Westminster Bank Plc v. Inland Revenue Commissioners* [1995] 1 AC 119, the (then) House of Lords held that in the context of company law, shares were "issued" when the entire process of application, allotment and registration had been completed and that this was the meaning to be accorded to these terms in the context of the then English Companies Act.

[130] In *Raja Khairulazaman Shah Raja Aziddin & Ors v. Zaman Indah Sdn Bhd* [1978] CLJU 166; [1978] 1 LNS 166; [1979] 2 MLJ 1815 Abdoolcader J in deciding the question of when shares would be entered on the register of members upon payment held:

> The legal effect of an allotment, which is an appropriation to a person of a certain number of shares but not necessarily of any specific shares, depends on circumstances, for it may be an offer of shares to the allottee or an acceptance of an application for shares by him, but an allotment of itself does not necessarily create the status of membership, even when the contract to take the shares is complete (*Spitzel v. Chinese Corporation Limited* [1899] 80 LT 347.) *A resolution to allot shares is not necessarily the issue of them as the term 'issue' would appear to mean allotment followed by registration or possibly by some other act, distinct from allotment, whereby the title of the allottee becomes complete* (*Clarke's Case* (1878) 8 Ch 635). (emphasis added)

[131] The distinction is therefore clear in that allotment precedes issuance, with the latter denoting full title being accorded to the recipient, who then enjoys the status of a member. Allotment does not bestow full title but denotes an appropriation of a number of shares to a person.

[132] Section 75(1) deals *inter alia* with the allotment of shares in the company by directors and requires prior approval by way of resolution from the company in general meeting. Section 75(2) provides specific exemptions from the need to obtain such approval where the allotment relates to a rights issue, a bonus issue or the allotment of shares to a promoter of the company. Section 75(2)(d) which is relevant in the present context provides an exemption for shares which are to be issued as consideration or part

consideration for the acquisition of shares or assets by the company. It details how the members are to be advised of the proposed issuance before the directors can effect such issuance for the purposes of financing a merger or acquisition.

[133] Section 85(1) protects shareholders' preemptive rights in relation to issuance to third parties but such protection is subject to the constitution of the company.

[134] Bearing in mind that these seemingly differing provisions should be read harmoniously and not so as to conflict with each other, a coherent legal construction would be that while s. 75(2) recognises that the ambit of the powers of management exercised by directors in the raising of capital for the purposes of part financing acquisitions *bona fide*, in the interests and growth of the company, are not subject to the requirement of shareholder approval by way of resolution at general meeting (although the other conditions with regards to notification have to be met), s. 85(1) protects and preserves the preemptive rights of shareholders, by statutorily providing for such rights, but allowing the constitution of the company to prevail over those preemptive rights of shareholders.

[135] Section 75 appears to deal primarily with allotment while s. 85(1) deals with the issuance of shares which may affect preemptive rights of shareholders.

[136] Section 85(1) further recognises the right of the shareholders to contractually determine whether and if so how they may provide for the disapplication or surrender of their preemptive rights, by way of the constitution itself.

[137] This position is further cemented in public listed companies like Apex Equity where requirement 7.08 of the MMLR makes it mandatory for such statutory preemptive rights to be subject to the provisions of the constitution. This too allows the shareholders to determine whether they wish to relinquish or surrender such rights.

[138] The constitution represents the contractual position adopted between the shareholders and the company as well as the shareholders *inter se*. This entitlement is accorded statutory recognition in s. 85(1). A degree of flexibility, the extent of which is to be determined by the shareholders, is therefore allowed in relation to how preemptive rights are to be dealt with.

[139] As the constitution of Apex Equity in the instant case in article 11 (per requirement of 7.08 MMLR) requires approval for the issuance of new shares, as contained in the words 'subject to direction to the contrary by the company at general meeting', it follows that the directors are bound by virtue of s. 85(1) to ascertain and obtain the approval of the shareholders at general meeting for such proposed issuance of shares, although such issuance is for the financing or part-consideration for a proposed acquisition.

[140] Therefore in construing s. 85(1) and article 11 together, the legislative background to the Act provides significant background for inferring the intent of the Legislature in introducing these Legislative changes. It is apparent that it was not the intention of the Legislature to:

(i) reduce or limit directors' powers to allot and issue shares, particularly where such shares are consideration or part consideration for the acquisition of an asset (see s. 75(2)(d)); and

(ii) enlarge or expand preemptive rights so as to elevate such rights to a mandatory entitlement which overrides or supersedes the provisions of the constitution of a company which may allow for the disapplication or surrender of such preemptive rights at the behest of the shareholders at general meeting.

[141] Accordingly, any construction of these provisions should comprehend and harmonise the purpose of the Act, rather than stultify the same. Given this Legislative background, we now turn to consider the basis of the decision of the Court of Appeal.

Analysis Of The Decision Of The Court Of Appeal

[142] The Court of Appeal reversed the decision of the High Court, holding that Concrete Parade had both a statutory and contractual preemptive right to be offered new shares in Apex Equity.

[143] The Court of Appeal construed s. 85(1) of the Act together with article 11 of the AA of Apex Equity (now the constitution), as imposing a mandatory duty and/or obligation on Apex Equity to offer any proposed issuance of new shares to the existing shareholders first, before being considered or offered for private placement to third parties. This brings to the fore the weight to be accorded to the words 'subject to the constitution' in s. 85(1) of the Act, and the rationale or intent of the Act as discussed above.

[144] The Court of Appeal held that s. 85 of the Act was breached in that Apex Equity effectively deprived all of its shareholders, including Concrete Parade, of both their statutory and contractual preemptive rights in relation to the proposed placement shares. The consideration shares which were also to be allocated and issued to Mercury were not a subject of grievance.

[145] There is no reasoning accorded as to why or how the Court of Appeal arrived at this conclusion, save that it chose to accept Concrete Parade's argument, and reject that of Apex Equity and the directors of Apex Equity.

[146] We reiterate our analysis above (at paras. 124 to 142) in relation to how s. 85(1) is to be construed in the context of the present appeal.

[147] Firstly, s. 85(1) was construed *in vacuo* with no consideration accorded to related provisions, or the underlying intent of the Act. A

[148] With respect, the Court of Appeal, by undertaking an approach which failed to consider the purpose and intent of the Act, in interpreting s. 85(1), failed to give consideration to the statutorily prescribed mode of statutory construction specified in s. 17A of the Interpretation Acts 1948 and 1967. The omission to consider the purpose and/or intent of the Act often results in a construction that does not meet or adhere to the objective of the Act. The consequences are considered further below. B

[149] The Court of Appeal instead undertook a construction of the statutory provision together with the relevant article in the AA of Apex Equity. C

[150] In the judgment of the Court of Appeal, s. 85(1) of the Act is reproduced as is article 11 of the AA. It is evident from the reproduction and juxtaposition of s. 85(1) above article 11 that:

(i) the Court of Appeal chose to read s. 85(1) concurrently with article 11. A rather than construing the statutory preemptive rights accorded by s. 85(1) as being subject to, or conditional upon the contents of the AA of Apex Equity as expressly provided for in the statutory provision; D

(ii) the use of such a concurrent approach is, with respect, flawed, because the express terms of s. 85(1) provide that the right of preemption in relation to a proposed allocation and issue of new shares are subordinated to the content of the constitution of a company. The Court of Appeal failed to comprehend that as such, the preemptive rights of shareholders in the very statutory provision affording shareholders protection, is subject to, or subordinated to what is stipulated in the constitution of the company; and E F

(iii) the Court of Appeal, with respect, failed to comprehend that the subordination of preemptive rights as provided for in s. 85(1), does not allow for the adoption of a construction where legislation is construed concurrently or in concert with the provision in a company's constitution detailing how preemptive rights of shareholders are to be dealt with. It is not tenable to construe s. 85(1) together with article 11 of the AA concurrently or in concert, as if they are both equivalent or on a par with each other. G H

[151] To construe article 85(1) together with article 11 of the AA is to attempt to align or level s. 85(1) of the Act with the content of the constitution, namely article 11; while the intent of the Legislature and the correct approach is to give effect to the words 'subject to'. And this is done by recognising and acknowledging that the content of the AA (now the constitution) prevails over the statutory rights conferred under s. 85(1) of the Act. I

[152] Needless to say, the application of such differing modes of construction, gives rise to different results.

[153] If full effect had been given to the express words of s. 85(1), the Court of Appeal would have recognised that the Act does not confer absolute mandatory preemptive rights in respect of the new issuance of shares by a company. This is because of the express words, "subject to the constitution" in s. 85(1).

[154] As such, in this jurisdiction, the statutory protection in the form of preemptive rights accorded to shareholders under the second part of s. 85(1), is dependent on how the shareholders, as investors, have contracted in their AA (or constitution), firstly with the company and secondly with other shareholders or members *inter se*.

[155] In the case of a listed company, the mandatory requirement in requirement 7.08 of the MMLR requires that the provision stipulated in those rules be incorporated.

[156] And the wording of requirement 7.08 which is mirrored in article 11, and which is identical to the older and now repealed model article in reg. 41 in Table A, already provides historical basis as to how the provision is to be read. The Act does not, *vide* s. 85(1), create greater mandatory preemptive rights for shareholders, by reason of those very rights being conditional upon the content of the constitution.

[157] As such, it is open to the shareholders to determine that they wish to relinquish or accede to the proposed issuance of new shares for the purposes of part consideration for a corporate exercise if they so determine. And such determination is ascertained at general meeting by votes taken on the proposed resolution. That is the effect of article 11 of the AA of Apex Equity. If they wish to assert their preemptive rights then they may do so by voting against the resolution for the proposed business merger which involves part payment by way of private placement. If they wish to vote in favour of the business merger, then they may do so by voting in favour of the same, which means that those private placement shares which are necessary to provide the capital to secure the merger, will not be available for purchase by them. They effectively choose to disapply or cede their option to purchase the same by voting in favour of the merger.

[158] Put another way, the Parliament has determined that the preemptive rights of shareholders can be disapplied or not, depending on the free contracting will of the shareholders, as expressed in the constitution.

[159] It follows further that the historical treatment of preemptive rights of shareholders continues to prevail. Such rights are neither absolute nor mandatory in this jurisdiction.

[160] While the Act does protect such preemptive rights, it allows for a degree of freedom on the part of shareholders to craft the ambit of such preemptive rights as they see fit. This is fortified by the expansion of the exemptions to shareholder approval at general meeting as set out in s. 75(2) of the Act. This gives the directors considerable freedom to move forward with the management of the company in terms of acquisitions using newly issued shares as consideration or part consideration, for the *bona fide* purposes of facilitating the expansion and growth of a company.

[161] The position under the Act has not therefore, altered or varied the previous position under the repealed CA 1965, but strengthened it.

[162] The Court of Appeal erred in the approach it undertook to align the preemptive statutory rights together with article 11 by ignoring the fact that the former was subject to the content of the constitution as embodied in article 11.

[163] In the context of the constitution of Apex Equity, the shareholders enjoy preemptive rights but on a non-compulsory basis. The preemptive rights of the shareholders, as protected in the second part of s. 85(1) can, by virtue of the constitution, namely article 11, be disapplied, yielded or ceded by the shareholders of the company at general meeting, if they so determine. Such a construction is further fortified by ss. 75(1) and 75(2) of the Act.

[164] Moreover s. 76(1) retains the old s. 132D(2) which allowed for approval to be given to the directors at an annual general meeting for a general power of issuance of new shares unconditionally ('general mandate') or conditionally. This too goes to show that the discretion to be accorded to the directors is not statutorily restricted or confined, but left to the shareholders to determine. Section 76(1) spells this out.

[165] So given this broad power of issuance of new shares under the Act, particularly as in the instant case, for the purposes of part consideration for the acquisition of Mercury, can it be said that s. 85(1) and article 11 must be read as imposing a stringent and mandatory regime restricting the rights of management, exercising a *bona fide* to expand the growth of the company? The answer must be a resounding no.

[166] This brings us to the question of whether the shareholders at the two general meetings of Apex Equity on 19 June 2019 and 18 November 2019 did, or did not, yield or relinquish their preemptive rights to the proposed placement shares for the purposes of the acquisition of Mercury.

What Is The Legal Construction To Be Accorded To The Words Subject To Direction To The Contrary By The Company At General Meeting In Article 11 Of The Articles Of Association?

[167] It is a pertinent reminder that article 11 mirrors requirement 7.08 of the MMLR. This is of significance because the MMLR require each of the public listed companies to include such a provision in their constitutions. As

such, the construction accorded to the terms 'Subject to direction to the contrary by the company at general meeting' will be applicable not only in the present appeal but for other listed companies. It will determine how their affairs are to be conducted on a regular basis.

[168] The Court of Appeal went on to construe article 11 of the AA of Apex Equity. Although the Court of Appeal applied the express provision prefacing s. 85(1) which states that such rights of pre-emption are "subject to the constitution", it held that the approval of the private placement resolutions, *albeit* at the first or the second extraordinary general meetings of Apex Equity held to gain shareholders' approval for the proposed merger, did not amount to "direction to the contrary" as envisaged in article 11 of Apex Equity's articles of association, *ie*, its constitution.

[169] This is because it read s. 85(1) of the Act together with article 11 of the AA of Apex Equity, as imposing a mandatory duty and/or obligation on Apex Equity to offer any proposed issuance of new shares to be offered first to the existing shareholders before being considered for private placement.

[170] It further read the exemption to the right of pre-emption in article 11 as being operative, only if the party waiving it, namely the general body of shareholders "had knowledge of its legal rights and with that knowledge, consciously chose not to exercise the same".

[171] The Court of Appeal construed 'subject to direction to the contrary at a meeting of the company' to mean that the company or its management/directors must advise the shareholders, prior to the proposed issuance of new shares for the raising of capital to be preceded by:

(i) an express reminder to the shareholders' of their preemptive rights under s. 85(1) in relation to the proposed issuance of new shares, in a circular preceding the meeting, explaining the proposed corporate exercise and proposed resolutions to the shareholders;

followed by

(ii) a clear and express statement that by the resolution they comprehend and acquiesce to a waiver of their preemptive rights to the new shares proposed to be issued at a general meeting.

[172] In short, the Court of Appeal prescribed that the content of any circular seeking approval of the shareholders at general meeting for approval for a capital raising exercise involving the issuance of new shares has to contain a specific reference and explanation of s. 85(1) together with a stipulation of what amounts to a disapplication, or ceding of such preemptive rights, as well as the consequences of so doing.

[173] However neither the constitution of Apex Equity nor the Act contain any such stipulations. In the absence of such requirements, should such conditions be read into article 11 or s. 85(1)?

[174] By so construing these provisions and imposing these conditions, the Court of Appeal extended and augmented the natural and ordinary meaning of the words 'subject to direction to the contrary by the company at general meeting'.

[175] The term 'subject to direction', means subject to instruction or order or stipulation. Applied to article 11, these words in their plain and ordinary sense mean that where the shareholders at general meeting 'direct' or instruct, or command, or communicate that they:

(i) do not oppose the business merger or the private placement for purposes of part payment; or

(ii) do not want to exercise their preemptive rights under article 11 (and s. 85(1), then that is sufficient to allow the management *ie*, the directors to proceed with the raising of capital by issuing new shares to third party places.

[176] 'Direct' or 'direction' does not, of itself, require that either preemptive rights to shares or s. 85(1) be explained to shareholders, whether by way of circular or otherwise.

[177] To therefore impose conditions as stated above amounts to an unwarranted expansion of the intent and purpose of s. 85(1).

[178] This in turn brings to the fore the question of the extent of information, or more correctly, education, a company has to provide in the information and particularisation of its circulars at general meetings.

[179] Is it necessary to explain the law in s. 85 to shareholders of a public listed company before approval for acquisitions or disposals or mergers or the procuring of capital can be evoked? Does the concept of preemptive rights commencing from s. 75 and s. 85 of the Act require explanation in every circular relating to issuance of new shares?

[180] Further, such an expansive construction as stipulated by the Court of Appeal presumes that shareholders are unaware of their preemptive rights to shares both in the Act and under the constitution. And that in order to protect such preemptive rights in respect of shares proposed to be newly issued, the shareholders must expressly stipulate that they consent to the disapplication of their preemptive rights.

[181] The fact that the shareholders by majority consented to the proposed issuance of new shares by voting in favour of a resolution that explains that the proposed private placement is necessary to raise capital to facilitate the business merger, was found to be insufficient.

[182] The Court of Appeal failed to consider that the shareholders, by voting in favour of the business merger and therefore the private placement as part consideration, did comprehend or ought to have comprehended, that:

(i) their shareholding would be diluted by the proposed issuance of shares for the private placement; and

(ii) they were disapplying or yielding their preemptive rights to those shares comprising the subject matter of the proposed placement, in favour of the business merger.

[183] If the Court of Appeal did indeed consider this and nonetheless rejected the foregoing construction, it did, with respect, err in law.

[184] It must be remembered that preemptive rights of shareholders in a company's constitution are contractual in nature and that the final contract relating to such rights are determined by the shareholders and the management of the company. If shareholders want preemptive rights to be mandatory, they can contract so. And if they choose to allow such matters to be surrendered, yielded or ceded, or partially so at general meeting, then they contract to that effect in the constitution.

[185] Is it therefore tenable to maintain that such contracted rights have to be specifically explained to shareholders and an express confirmation of the disapplication or surrender of such rights be expressly obtained, when for example, the company is embarking on a capital raising exercise for the purposes of a merger or acquisition?

[186] In point of fact is not the converse the correct position, given the content of the constitution? Namely that shareholders, are or should be aware of their preemptive rights as stipulated in the constitution of the company in which they have chosen to invest or in having contracted specifically for preemptive rights?

[187] In such event, they are or ought to possess sufficient knowledge to approve or reject the proposed corporate acquisition or merger involving the issuance of new shares, without the necessity of specifying and explaining the law and requiring an express statement to the effect that they comprehend their preemptive rights under the statute and the constitution and are prepared to disapply or relinquish those rights.

[188] Therefore the Court of Appeal erred in finding that the private placement could not supersede the shareholders' including Concrete Parade's preemptive rights under s. 85(1). This is what the Court of Appeal held at para. 27 of the judgment:

> [27] We find that the placement resolution cannot displace the appellant's statutory preemptive rights to the placement shares which breach is oppressive because it has resulted in: (i) the unjustified dilution of the appellant 's shareholding in Apex Equity because an additional 20 million new shares have been issued to the outsiders despite the statutory safeguard in s. 85 of the CA 2016, where the legislative intent was to 'maintain the relative voting and distribution rights of those

shareholders.'; and (ii) the loss of opportunity to enhance the appellant's shareholding in Apex Equity by subscribing for part of the placement shares.

[189] For the reasons set out above, the conclusion that there was an 'unjustified' dilution of Concrete Parade's shareholding in Apex Equity 'despite the safeguard in s. 85' is wrong. The further conclusion that this resulted in oppression to Concrete Parade is also aberrant given that the majority of the shareholders in Apex Equity voted in favour of the proposed private placement, which would indubitably have the consequence of diluting their existing shareholding.

[190] Secondly, the Court of Appeal appears to suggest *vide* its construction of s. 85(1) that even prior to obtaining approval for the proposed merger, it was incumbent upon Apex Equity to make an offer to existing shareholders of the proposed issue of private placement shares, even without knowing whether shareholder approval could be obtained for the merger as a whole. And arguably, given the tenor of the judgment, that such an offer should be made to existing shareholders prior to the entry into the HOA, BMA and subscription agreements, all of which were conditional.

[191] The practical effect would be that the company would have to make an offer of shares to the existing shareholders even prior to having obtained approval for the entire merger. As pointed out in the article entitled *Shareholders' Pre-Emption Rights to New Shares – The Legislative and Regulatory Scheme* (referred to earlier), this means that there ought to be compliance with the provisions of s. 237 of the CMSA, MMLR and other relevant statutory guidelines.

In effect, the requirements of a rights issue would have to be complied with. This will increase the costs of, and substantially delay any proposed corporate transaction. If the shares are taken up by the existing shareholders, whether partially or completely, and the merger then falls through, the entire exercise would be futile.

[192] Given that the purpose and intent of the Act is to facilitate rather than stultify the growth of companies *albeit* with sufficient regulation, the construction accorded to s. 85(1) and article 11 is not tenable and erroneous in law. With respect, the decision of the High Court is to be preferred as it adopts the correct approach.

What Constitutes 'Direction To The Contrary'?

[193] Reverting to the issue of what constitutes 'direction to the contrary', the Court of Appeal placed great reliance on the Indian High Court decision in *Shanti Prasad Jain v. Kalinga Tubes Ltd* [1965] AIR 1535. As stated earlier, this decision determined the construction to be placed on s. 81 of the Indian Companies Act which is not in *pari materia* with, but bears resemblance to our s. 85. The Indian s. 81 provides that newly issued shares would be

offered in the first instance to existing shareholders in proportion as nearly as the circumstances permit "subject to any direction to the contrary which may be given by the company in general meeting". It differs from our s. 85 in that our provision opens with the words "subject to the constitution".

[194] Nonetheless, it is of relevance as the constitution in Apex Equity contains the words in s. 81 of the Indian Act, namely "subject to any direction to the contrary which may be given by the company in general meeting".

[195] In the High Court of India, it was held that the words "subject to any direction to the contrary …" could not have the effect of fully displacing the existing shareholders' preemptive rights but only served to refer to the manner and proportion in which the new shares are offered to the existing shareholders. The Court of Appeal adopted this construction in its entirety. The consequence of such a construction is that no new shares may be issued unless they are first offered to existing shareholders. The term "subject to direction to the contrary" only relates to the proportion and how such shares are to be distributed. By adopting this construction, the Court of Appeal effectively elevated the preemptive right in s. 85 in this jurisdiction, to the status of a mandatory and obligatory entitlement in every and any instance of the issuance of shares. This construction, with respect, is contrary to the legislative intent and purpose of the Act.

[196] Moreover the Court of Appeal also adopted the conclusion of the Indian High Court that such failure to offer new shares to the existing minority shareholders amounted to oppression.

[197] To make matters worse, the citation of the Indian High Court decision and reliance by counsel for Concrete Parade on this authority was fundamentally wrong. This is because the Indian Supreme Court found the decision of the High Court to be incorrect. It held that shareholders at a general meeting, having decided that new shares should not be issued to the existing shareholders but to others, did NOT amount to a contravention of s. 81 of the Indian Companies Act 1956 and that the resolution held was in accordance with law and was valid. The reasoning of the Indian Supreme Court is as follows:

> Consequently it was open to the public company in 1958 when it proposed to increase the subscribed capital after the sanction of the Controller to act under s. 81 and this was what was done by the resolution of March 28 1958 at the general meeting. *The general meeting decided that new shares should not be issued to the existing shareholders but should be issued to others privately. The resolution of March 29 1958 was in accordance with the law as it stood when it was passed and cannot be said to be vitiated in any way.*
>
> …

> We have already said that the public company which came into existence in 1957 was not bound by the agreement of 1954 and could offer shares to such persons as it decided to do in general meeting in accordance with s. 81. *The mere fact that in the meeting of March 29, 1958 it was decided to offer shares to others and not to the existing shareholders would not therefore necessarily mean oppression of the minority shareholders the majority shareholders were not bound to accept the view of the minority shareholders that new shares should be allotted only to the existing shareholders.* (emphasis added)

[198] It is therefore clear that the Court of Appeal erred not only in its finding that preemptive rights under s. 85(1) are effectively mandatory, but also that any complaint by a dissenting minority in relation to an alleged contravention of the section does amount to an act of oppression as envisaged under s. 346 of the Act.

[199] In *Re Great Eastern Hotel (Pte) Ltd* [1988] CLJU 198; [1988] 1 LNS 198; [1989] 1 MLJ 161, similar treatment was adopted by the High Court of Singapore in relation to an article in the company's constitution worded similarly to article 11 where it was held that by virtue of the said article, the company was entitled to give any direction with regard to the allotment of new shares. The resolution passed at general meeting did not require the direction to be specific.

[200] In conclusion in relation to this issue, the complaint of an alleged contravention of s. 85(1) fails. As such, there can be no occasion for a complaint of oppression.

[201] It is important to emphasise, at stated at the outset, to ensure that:

(i) complaints by dissenting shareholders in relation to the exercise of management powers pertaining to business mergers and acquisitions which have the approval of the majority, are not stymied by the minority using the channel of an oppression action. This effectively amounts to an interference with management powers and the will of the majority. The raising of capital for the proposed acquisition of Mercury needed part financing, and was approved by the majority of the company at general meeting. There was no basis for suggesting that the proposal to part finance the merger by the issuance of new shares to third parties by way of a private placement amounted to a contravention of s. 85(1) and thereby an act of oppression. There is no nexus shown by Concrete Parade in relation to the complaint of oppression and any actual damage suffered by it as a shareholder, particularly when the majority of the shareholders, who were in the same position chose to approve the merger. It is undeniable that by doing so, they chose to disapply or renounce their preemptive rights in order to enable financing for the merger; and

(ii) the division of powers between management and the shareholders in general meeting is a well-established principle. The effect of the decision of the Court of Appeal infringes on that principle by suggesting that shareholders in general meeting may interfere with a proposal of the directors containing the conditions or terms and purpose of a placement issue to third parties. As explained comprehensively in the paper entitled *"Shareholders Preemptive Rights to new Shares in the Legislative and Regulatory Scheme"*, which has been referred to earlier, the shareholders in general meeting are "constitutionally incompetent to direct or exercise supervisory powers over the directors as to how to arrange and manage the business and affairs of the company".

Role Of Counsel In Making Submissions To The Courts

[202] The fact that an incorrect and long overruled decision was cited to the Court of Appeal by counsel for Concrete Parade in the instant case, warrants further comment. The net effect of the error was to cause the court to arrive at a decision which it might not have, if the law had been correctly and fully cited. This is of importance because such mistakes carry grave consequences, such as an erroneous decision by the court. This in turn, can have considerable effect on the manner in which corporate transactions are carried out generally within the jurisdiction, as is the case here. It effectively determined that prior to any negotiations being finalised the directors or management of the company had to seek shareholders' approval, notwithstanding those matters had not been finalised and despite all agreements being conditional in nature.

[203] It is therefore incumbent upon counsel to ascertain that a case cited is the correct and most recent pronouncement of the principle it is sought to support. The citing of a case that has been overruled can arise from ignorance coupled with a lack of diligence at one end of the scale, to misleading at the other end. Misleading carries with it shades of dishonesty, which is anathema to any solicitor or barrister practicing before a court, to whom the barrister owes his primary duty.

[204] Given the growing tendency to cite authorities which are not relevant, or to fail to point out salient differing features such as the overruling of a decision, such instances of misleading should not simply be ignored, or mentioned in passing, but should be subject to censure and disciplinary action.

[205] The counsel for Concrete Parade in the present case, failed or omitted to carry out sufficient research to determine that the Indian High Court decision had, in fact been overruled. As these cases date back to the fifties and sixties of the last century, it cannot be said that the overruling was a difficult point to check and correct as soon as it was ascertained. This court

has had occasion previously of highlighting the importance of determining that authorities are researched with sufficient particularity to ensure that the courts are not misled.

[206] In the case of *Mak Siew Wei v. Yeoh Eng Kong & Other Appeals* [2019] 7 CLJ 470, the following passage is relevant:

> [73] It is with some hesitancy that we bring up this post-script, applicable not only in the instant case, but recently in many cases that this court has had occasion to deal with. When learned counsel cite case-law to this court, *albeit* domestic or foreign cases, it is essential that they have ensured that the case cited has not been overturned, criticised or even distinguished by subsequent court decisions. The importance of doing so needs no underscoring. The correct standard to be adhered to *albeit* by counsel from the Bar or judicial officers from the Attorney-General's office is simply that it is inexcusable for a lawyer to fail as a matter of routine to study and examine all cited cases to ensure that there is no citation of a case as a 'precedent', when it no longer qualifies as such. Given the technology present today that duty is no longer as onerous as it once was. The use of Westlaw or Lexis Nexis and numerous other legal research engines allows this to be done with ease, so much so that a failure to carry out this exercise warrants genuine judicial concern as to whether an incorrect citation is inadvertent or deliberate. Both give rise to negative impressions and consequences, although the latter is considerably worse as it amounts to misleading the court. In short, the standard of reasonable diligence or inquiry into the law is expected of all lawyers addressing the courts.
>
> [74] The rationale underlying the need for well-researched appellate advocacy is obvious. The courts are overburdened at the best of times, and in the context of the adversarial system, judges rely upon legal arguments and authorities put forward by counsel in writing their judgments. Any slack in legal research or incorrect citations of case-law, particularly in novel or difficult areas of the law, may well result in a misstatement of the correct position in law.
>
> [75] The need for well-researched briefs and advocacy is a cornerstone of the administration of justice. In Malaysia, where the profession is fused such that any lawyer may appear before any level of the hierarchy of the courts, it is even more imperative that standards of advocacy are maintained at the highest levels, so as to ensure accuracy in the development of the law.

The Answers To Question (iv)

[207] We answer question (iv)(a) in the affirmative. This means that shareholders may at general meeting vote on a resolution to disapply their preemptive rights in full, not just in relation to the manner and proportion in which shares are offered to existing shareholders.

[208] We answer question (iv)(b) in the negative. It is not necessary for the proposed resolution to expressly stipulate or explain the nature of preemptive rights under s. 85(1) of the Act and that the passing of a proposed resolution amounts to a disapplication of those preemptive rights.

[209] We answer question (iv)(c) in the negative. An agreement for the allotment of shares to third party places, other than existing shareholders, which is conditional on shareholders' approval at general meeting, does not contravene s. 85(1) of the Act. This is all the more so where shareholders' approval in general meeting was obtained prior to any allotment or issuance of the shares.

[210] In para. 30 of the Court of Appeal grounds of judgment, the Court of Appeal agreed with the appellant there, *ie*, Concrete Parade that the invalid offer and issuance of the placement shares under the subscription agreements constitute unfairly prejudicial conduct within the meaning of s. 346 of the Act, relying on the English case of *In Re A Company (No 005134 of 1986), ex parte Harries* [1989] BCLC 383 ("*In Re A Company*"). In our view, with respect, the Court of Appeal erred in doing so because the facts are entirely distinguishable. For one thing, the company in *In Re A Company* initially had only two shareholders, R and his wife. R entered into a joint venture with H who was appointed as a director and was allotted 40% of the issued share capital, in exchange for providing free premises for the company. R secretly allotted himself shares increasing his holding in the company to 96.1%, thus reducing H's holding from 40% to 4%. It was in these circumstances that the English High Court Judge held that this allotment constituted unfairly prejudicial conduct due to R's secrecy in not allowing H the opportunity to take up shares proportionate to his existing holdings.

[211] Whereas in our present case, which involves a public listed company, Apex Equity, the minority shareholder Concrete Parade voted at the general meeting where the merger was approved by the entire shareholder body. Concrete Parade was fully aware at all material times that the merger was proposed to be partly financed by the allotment and issuance of new shares. The purpose of the proposed issuance of new shares of Apex Equity was for a *bona fide* purpose namely to raise capital for the merger. There is no question of *mala fides* or any other collateral purpose as was the case in *In Re A Company.*

[212] Secondly, *In Re A Company* was a case decided under s. 17 of the English Companies Act 1980, which, like s. 81 of the Indian Companies Act 1956, does not have the opening words "Subject to the constitution" which are present in our s. 85. Therefore, the right of pre-emption was mandatory and not subject to the constitution. Our remarks on the Court of Appeal's wholesale adoption of the Indian High Court decision of *Shanti Prasad Jain v. Kalinga Tubes Ltd* [1965] AIR 1535 above in paras. 194, 196 and 199 are relevant here.

The Second Issue: The Legal Construction Of Section 223 Of The Act

[213] Next we turn to the second issue in this appeal, namely how s. 223 of the Act is to be construed. As stated at the outset, this issue is of pivotal importance because the answer to this question determines and defines:

(i) the juncture or point in time when management *ie*, the directors, are bound to seek shareholders' approval in relation to the acquisition or disposal of assets within a company. Under s. 223, must shareholders' approval necessarily and/or mandatorily be obtained prior to entry into a conditional contract, *ie*, when the company and the counter party or parties are at the negotiation stage?

(ii) or do the directors have the discretion to execute contracts for entry into a proposed acquisition or disposal which is expressly made subject to shareholders' approval, amongst other conditions?

[214] In other words, does entry into an agreement setting out the proposed details of the merger but which is specifically subject to a series of conditions precedent requiring *inter alia*, shareholder approval, amount to entering into the merger or carrying into effect the merger?

[215] Or are the directors constrained to revert to the general body of shareholders prior to entry into such conditional contracts?

[216] Concrete Parade maintains that the latter construction of s. 223 represents the correct position and the Court of Appeal concurred. The appellants on the other hand collectively submit otherwise – namely that no shareholders' approval is required for entry into a contract for the proposed acquisition or disposal of the substantial assets of a company.

[217] Secondly, how is the word 'or' in s. 223(b) interspersed between (i) and (ii) to be interpreted? Conjunctively or disjunctively?

[218] These are key issues arising for consideration in the construction of s. 223 that require scrutiny.

[219] In these appeals, these issues in relation to s. 223(1) comprise the subject matter of the first, second and third questions of law. For convenience, we reproduce them here:

Section 223 Of The Companies Act 2016

(i) where a company enters into any arrangement or transaction falling within s. 223 of the Companies Act 2016 ("CA 2016"):

  (a) can s. 223(1)(b)(i) and (ii) of the CA 2016 be read disjunctively, such that it is sufficient if either:

    (1) the agreements relating to the arrangement or transaction are expressly made subject to the approval of the company by way of a resolution; or

A (2) the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution?

(ii) where two or more agreements are construed as forming one composite transaction constituting an arrangement or transaction falling within s. 223 of the CA 2016 for the acquisition or disposal by a company of
B substantial property, then:

(a) would s. 223(1)(b)(i) of the CA 2016 be satisfied if at least one of the agreements forming the composite transaction contains an express condition precedent requiring a resolution of the shareholders of the company for the said arrangement or
C transaction?

(b) would s. 223(1)(b)(ii) of the CA 2016 be satisfied by the passing of a resolution of the company in a general meeting approving the said arrangement or transaction before the arrangement or transaction becomes unconditional and binding on the parties to the
D arrangement or transaction and is carried into effect?

(iii) does s. 223(1)(b) of the CA 2016 impose an "incumbent duty on the directors to inform shareholders" of any intention to 'enter into' and/or 'carry into effect' an acquisition or disposal of substantial assets
E of a company" based on the decisions in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616 and *Smithton Ltd (Formerly Hobart Capital Markets Ltd) v. Naggar* [2015] 1 WLR 189?

[220] We also reproduce s. 223(1) of the Act below for ease of reference:
F

Approval of company required for disposal by directors of company's undertaking or property

223(1) Notwithstanding anything in the constitution, the directors shall not enter or carry into effect any arrangement or transaction for:

G (a) the acquisition of an undertaking or property of a substantial value; or

(b) the disposal of a substantial portion of the company's undertaking or property **unless**:

H (i) **the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; or**

(ii) **the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution.**

(emphasis added)

I

[221] We first turn to consider the decisions of the courts below. A

The High Court Decision In Relation To The Legal Construction Of Section 223 Of The Act

[222] The learned High Court Judge concluded that the effect of s. 223(1) of the Act, is that it suffices if only one of the conditions in sub-paras. (i) or (ii) is fulfilled. In other words, either the entry into the arrangement or transaction is made conditional on shareholders' approval by way of a resolution, or that the carrying into effect, that is, the acquisition or disposal is effected after approval has been obtained from the shareholders by way of resolution. B C

[223] This means that it is sufficient for the purposes of s. 223(1) if, at entry into an agreement to proceed with a merger upon terms and conditions yet to be fully worked out or fulfilled, such agreement is made subject to shareholders' approval at general meeting. There is a condition that has to be fulfilled failing which the merger cannot proceed. D

[224] Alternatively, the management namely the directors are to obtain shareholders' approval at general meeting before the actual or effective acquisition of the substantial asset takes place. This must mean the stage at which the transfer of ownership from the vendor to the company is effected or accomplished, in substance. E

[225] And so too where it is a disposal, namely that before ownership of a substantial asset of the company is parted with or transferred to a purchaser, shareholder approval must have been obtained.

[226] The reasoning of the High Court is that: F

(i) it would not be commercially practicable or desirable for shareholders' approval to be obtained prior to the entry of all arrangements or transactions of a substantial nature; and

(ii) on the true construction of s. 223(1) of the Act, an arrangement or transaction is only subject to shareholders' approval if it has the effect of creating enforceable obligations on the company to either acquire an asset of substantial value or to dispose of a substantial portion of its assets. G

[227] In this context, the learned judge found that the Heads of Agreement ('HOA') merely constituted an agreement to agree, and was not enforceable as it did not create contractual rights or obligations. H

[228] Further, even if the HOA was thought to be in contravention of s. 223(1) of the Act, the BMA was expressly specified to be 'subject to shareholders' approval', and hence was in compliance with s. 223(1) of the Act. I

A **The Court Of Appeal's Decision In Relation To Section 223(1) Of The Act**

[229] The Court of Appeal reversed the decision of the High Court.

[230] In construing s. 223(1) at para. 36 of its judgment, it held that upon a reading of the section, two separate and distinct restrictions were placed upon the directors of a company:

B

(i) to enter into an arrangement or transaction which has to be made subject to and/or contain a condition precedent for shareholder approval in conformity with s. 223(1)(b)(i) of the Act; and

C

(ii) to carry into effect an arrangement or transaction, for which prior shareholder approval must first be obtained in conformity with s. 223(1)(b)(ii) of the Act.

[231] The Court of Appeal saw the two conditions as being conjunctive notwithstanding the fact that the statutory provision utilises the word 'or'.

D **[232]** The rationale for such a construction is contained in paras. 40 to 46 of the judgment. In summary, as we comprehend it the Court of Appeal found that:

(i) legislative changes to s. 223 of the Act, reintroduced a restriction on directors of a company such that the "entry into" an agreement by a company for the acquisition or disposal of a substantial asset, made it necessary for such agreement to include a condition precedent in the agreement for shareholder approval to be obtained;

E

F

(ii) the Court of Appeal then traced the legislative changes prior to 2007 and post 2007 before agreeing with and relying on the judgment of Zainun Ali JCA (later FCJ) in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616 ('*Pioneer Haven*'). It was accepted that the intention of the legislation in removing the term 'to execute' in the old s. 132C was to reflect the intention of the legislation to restrict the operation of the section to a situation where the directors are carrying into effect the impugned transaction, as opposed to merely entering into it by executing an agreement;

G

H

(iii) the Court of Appeal went on to hold that with this re-introduction of the term 'entering into' in s. 223(1) of the Act, "the analysis of Zainun Ali JCA in *Pioneer Haven* must necessarily be extended to mean that the directors have an incumbent duty to inform shareholders of any intention to both 'enter into' and 'carry into effect' an acquisition of substantial assets;

I

(iv) it went on to impose a duty on directors to inform shareholders of any intention to "enter into" as well as to "carry into effect" the acquisition of substantial assets. In other words, such construction requires the

directors of a company to obtain approval of the shareholders at the inception of the proposed transaction *ie*, entry into any agreement as well as when the actual acquisition takes effect. Reliance for this proposition was placed on *Pioneer Haven and Smithton Ltd (formerly Hobart Capital Markets Ltd) v. Naggar* [2015] 1 WLR 189 ('*Smithton*');[2]

(v) (a) The Court of Appeal in applying this construction went on to hold that the HOA, the BMA and the subscription agreements form one composite transaction. It further concluded that all three agreements are required to implement the proposed merger exercise with Mercury. As they comprise one composite agreement, and as the HOA was the starting point for entry into the merger exercise, it had to be made subject and/or contain a condition precedent for the approval of the shareholders of Apex Equity;

(b) The fact that the HOA did contain conditions precedent, one of which was the need to obtain shareholders' approval at general meeting was rejected and found to be insufficient for the purposes of s. 223 of the Act; and

(vi) the Court of Appeal also held that the implementation and/or carrying into effect of the HOA, which it found was the execution of the BMA, required the prior approval of the shareholders of Apex Equity.

[233] The failure to obtain such approval prior to the execution of the BMA was found to be fatal in that the failure to do so amounted to a contravention of s. 223, which has the effect of rendering the transaction void.

[234] To summarise, the Court of Appeal held that s. 223(1)(b)(ii) of the Act was breached as:

(i) the HOA (being the starting point and/or the entering into of the merger exercise) which was completed on 18 December 2018 did not contain a condition precedent for shareholders' approval; and

(ii) the implementation and/or the carrying into effect of the HOA (being the execution of the BMA) required prior shareholders' approval before it was executed on 18 December 2018. Therefore, a shareholders' approval *via* the merger resolution obtained six months later on 19 June 2019 could not cure this transgression which had already occurred.

Parties' Submissions On Section 223(1) Of The Act

[235] The parties' submissions are outlined in brief. Given the length of each set of submissions, it is not possible to reproduce the same here in any detail.

[236] To start with, the submissions of the appellants and Mercury is as follows:

> Section 223(1)(b)(i) and (ii) of the Act should be read in accordance with their plain and ordinary meaning. It was further argued that the existence of the term "or" instead of "and" shows that section 233(1)(b)(i) and (ii) of the Act should be read disjunctively

[237] As the HOA, BMA and the Subscription Agreements form one composite transaction, s. 223(1)(b)(i) and (ii) of the Act would be satisfied if at least one of the agreements contained a condition precedent for shareholders' approval.

[238] Therefore, as long as the approval of the shareholders is obtained before the transaction becomes unconditional, it is sufficient to satisfy the operation of s. 223(1)(b) of the Act.

[239] As pointed out in *Pioneer Haven*, the purpose of s. 132C of the CA 1965 (the predecessor to s. 223(1)(ii) of the Act) was to prevent a company from parting with substantial assets without a general meeting. The "duty to inform" is complied with when shareholders' approval is obtained, before the substantial transaction is carried into effect. In the instant appeals with the express conditions precedent relating to the need for shareholders' approval at general meeting that 'duty to inform' which is the purpose of s. 223(1), is met in full. No acquisition whereby the ownership of Mercury was merged with JF Apex could take effect until and unless the conditions precedent were met. And in accordance with s. 223(1), the shareholders' approval requirement comprised a condition precedent to both the HOA and the BMA.

[240] On the other hand, Concrete Parade submitted that:

(i) there are two separate and distinct restrictions in s. 223(1)(b) of the Act. Both restrictions have to be complied with as they apply separately at different points in time, first upon the entry into the transaction and secondly upon the carrying into effect of the transaction;

(ii) the insertion of the entry restriction which was not available in the old s. 132C of the CA 1965, is intended to be an additional safeguard, hence it cannot be read disjunctively as it would mean directors can simply bypass the entry requirement by complying with sub-s. b(ii) of "carrying into effect" the proposed transaction;

(iii) (a) learned counsel for Concrete Parade further submitted that the proper approach to be adopted in construing s. 223(1) was to read the words:

> "… **the directors shall not enter** …" together with **sub-paragraph (i) of section 223(b),** namely **"the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution"** – such that taken together it would read "…

> the directors shall not enter into any arrangement or transaction for the acquisition or disposal of a substantial portion of the company's undertaking or property unless the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; (emphasis added)
>
> and
>
> To read the words "carry into effect any arrangement or transaction for" in s. 223(1) together with sub-para. (ii) of s. 223(1)(b), namely "… the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution …";
>
> (b) while such a reading of the section, distinguishing the entry into a transaction, with the carrying into effect of a transaction, is not entirely without merit, it is the crux of Concrete Parade's submission that in both situations, namely the entry into a transaction, as well as the carrying into effect of the transaction, shareholders' approval at general meeting is required;
>
> (c) this means that shareholders' approval has to be obtained twice at two different points of time in the course of a transaction. Such a result is achieved by the submission of Concrete Parade in construing the word 'or' between s. 223(b)(i) and (ii), as 'and' rather than 'or';
>
> (d) in other words, the two limbs (i) and (ii) in sub-s. (1)(b) of s. 223 are to be read conjunctively rather than disjunctively; and

(iv) the contravention of s. 223 falls within the category of unfair prejudicial conduct and disregard of interest because Concrete Parade was denied its statutory right to vote and approve the proposed merger prior to the execution of the BMA. Therefore, oppression was established.

[241] By way of reply, Mr Rabindra S Nathan for the appellants submitted in summary as follows:

(i) section 223(1)(b)(i) and (ii) of the Act should be given their plain and ordinary meaning. The construction canvassed by Concrete Parade which he termed the 'tramline approach' was not the proper approach to adopt in construing s. 223(1)(b)(i) and (ii). Instead, a holistic approach of the section was preferred; and

(ii) it was further submitted that the existence of the term "or" instead of "and" showed that s. 233(1)(b)(i) and (ii) of the Act should be read disjunctively.

[242] The difficulty with the "tramline" approach urged by Concrete Parade, it was submitted, is that it requires two sets of shareholders' approval – one during the entering into/execution stage, and another during the carrying into effect of the transaction.

[243] The holistic approach is to be preferred. The term "carry into effect" means the point when the arrangement or transaction becomes binding and enforceable (unconditional).

[244] Learned counsel pointed out that in *Pioneer Haven*, the Court of Appeal held that the purpose of s. 132C of the CA 1965 (the predecessor to s. 223(1)(b)(ii) of the Act) is to prevent a company from parting with substantial assets without a general meeting. The "duty to inform" is complied with when shareholders' approval is obtained, before the substantial transaction is carried into effect.

[245] Since the mischief that this provision seeks to address is to ensure that a binding and enforceable transfer of property does not take place until after shareholders have approved it, it would suffice if the arrangement or transaction contains a condition requiring shareholders' approval before it becomes binding and enforceable.

Our Analysis

[246] We earlier outlined the principles of statutory interpretation when dealing with s. 85 and the proper legal construction to be accorded to it. We adopt those principles here. In order to arrive at a legally coherent and correct construction of s. 223(1)(b)(i) and (ii), it is necessary to determine the underlying intent and purpose of the section which is consonant with the Act as a whole (see s. 17A of the Interpretation Acts 1948 and 1967).

[247] This is best achieved by studying the legislative history of the section. The original Companies Act 1965 contained no provisions requiring approval of the company (*ie*, shareholders) at general meeting prior to the disposal or acquisition of a substantial portion of a company's undertaking or property.

[248] This position changed with the introduction of s. 132C *vide* Act A616 Companies (Amendment) Act 1985 which required the approval of the company for the disposal of the company's undertaking or property. The terms of s. 132C are relevant in order to comprehend the current form of s. 223(1)(b)(i) and (ii) today. It provided:

> 132C(1) Notwithstanding anything in a company's memorandum or articles, the directors **shall not carry into effect any proposal for disposing of or execute any transaction for the disposal of a substantial portion** of the company's undertaking or property which would materially affect the performance of the company, unless those proposals or transactions have been approved by the company in general meeting.
>
> (emphasis added)

[249] It is evident that when introduced, the purport of s. 132C was to 'catch' or prohibit a substantial disposal of a company's property by the directors without shareholders' approval. It is equally clear that the words 'shall not carry into effect any proposal for disposing of' were targeted at actual disposal of the property.

[250] And the words "execute any transaction for the disposal of …" also refer to the completion or fulfilment of the transaction resulting in the company's property being removed or taken away or being transferred to a third party.

[251] The section did not refer to, or 'catch' entry into any agreements for a proposed disposal of the company's undertaking or property.

[252] *Vide* the next Amendment Act 2007 (A1299), the word 'execute' was removed:

> Section 132C Approval of company required for disposal by directors of company's undertaking or property
>
> (1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for:
>
> (a) the acquisition of an undertaking or property of a substantial value; or
>
> (b) the disposal of a substantial portion of the company's undertaking or property;
>
> unless the arrangement or transaction has been approved by the company in a general meeting. ...

[253] The section was expanded to include the acquisition of substantive assets by the company. However, it was also simplified somewhat to address the primary mischief of the acquisition of property of substantial value or disposal of a substantive portion of the company's property or assets unless shareholders' approval had been obtained. There was no specification in terms of timing, save that it had to be before the property was acquired or prior to the disposal of the company's assets being realised or completed. In other words, ensuring that the shareholders were aware of, and approved the transaction, was sufficient to satisfy the section.

[254] *Vide* the Act s. 223, the successor of the earlier s. 132C was introduced in its current form:

> **Section 223 of the CA 2016**
>
> 223. Approval of company required for disposal by directors of company's undertaking or property
>
> (1) Notwithstanding anything in the constitution the directors shall not enter or carry into effect any arrangement or transaction for:
>
> (a) The acquisition of an undertaking or property of a substantial value; or
>
> (b) The disposal of a substantial portion of the company's undertaking or property; unless

A (A) **the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution;**

(B) **the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution ...** (emphasis added)

B **[255]** Where earlier the only stipulation in s. 132C was for approval to be procured from the company at general meeting before the actual acquisition or disposal was carried out or performed or effected, the present s. 223(1)(b)(i) further expands the earlier provision by detailing or identifying how the requirement for communication and knowledge to the shareholders
C as well as their approval for the acquisition or disposal may be obtained.

[256] It is clear from s. 223(1)(b)(i) and (ii), that the management or directors may choose to obtain such approval at the time of the entry into the proposed acquisition or disposal, by making any agreement between the third party and the company for such acquisition or disposal subject to
D shareholders' approval at general meeting, which is to be evidenced by a resolution to that effect.

[257] Next, by applying the normal meaning of the word 'or' meaning alternatively, it appears from s. 223(1)(b)(ii) that the directors or management can choose to obtain such shareholders' approval at a later stage
E in the transaction, but before actual ownership of the asset is either acquired or parted with. This latter provision in (b)(ii) is consonant with the earlier s. 132C under the 2007 amendment.

[258] The effect of the new s. 223 is to detail the options available to the
F management or directors when negotiating and effecting on behalf of the company the acquisition or disposal of property or assets of a substantial value (as defined in s. 223(2)).

Intention Of Parliament In Legislating Section 132C

[259] The section was a form of protection for the shareholders against any
G disposal of substantial assets of the company without their approval. Earlier on in 1985, when the section was first introduced, and during the second reading of the bill, the then Deputy Minister of Trade and Industry explained the rationale behind such introduction:

H … Tuan Yang di-Pertua, selama ini didapati ada pengarah-pengarah yang telah membuat keputusan-keputusan dan mengambil tindakan-tindakan sesuka hati tanpa memikirkan kepentingan pemegang-pemegang saham. Ini biasanya merupakan satu penindasan ke atas pemegang saham minority. *Peruntukan-peruntukan baru dicadangkan dalam seksyen 132(c) dan 132(d) diwajibkan pelupusan harta benda syarikat dan pengeluaran saham-saham*
I *baru terlebih dahulu diluluskan di dalam mesyuarat agong bagi perlindungan kepentingan pemegang-pemegang saham minority. (3 APRIL 1985) DR-03041985.* (emphasis added)

[260] The Court of Appeal in *Pioneer Haven* analysed the changes in s. 132C(1) of the CA 1967 (the predecessor of s. 223(1)(b) of the Act) as follows:

> … [114] Section 132C as it is presently worded, does not express that the directors or company shall not enter into any arrangement or transaction for the disposal of substantial asset without prior approval by the company at general meeting. Instead, it says that the directors shall not carry into effect any such arrangement or transaction without approval of the company at general meeting.
>
> [115] Thus the words "or execute" in the old section have been deleted. *Clearly, the intention of the Legislation is to restrict the operation of the section to a situation where the directors are carrying into effect the impugned transaction, as opposed to merely entering into it by executing an agreement.*
>
> …
>
> [118] One might ask: what is the mischief which s. 132C seeks to avoid? *Reading the said s. as a whole, it is clear that the mischief which s. 132C was enacted to prohibit, was the parting by the company of any of its substantial assets without approval of the shareholders at general meeting s. 132C makes it incumbent upon the directors and the company to inform the shareholders of any intention to carry into effect any transaction whereby any substantial assets of the company was to be taken out of the company. This duty is indirectly imposed by requiring shareholders' approval before such transaction is carried into effect. The whole objective of s. 132C is designed to protect the interest of the company itself (in this case, Bukit Jalil) and not the interest of a shareholder, such as Ho Hup.*
>
> [119] … *Section 123C is surely not intended to apply to any transaction where the legal and beneficial ownerships of the relevant assets are still being possessed by the company. Otherwise, companies may find it irksome to carry on its normal corporate activity, such as granting a floating charge or even charge any of its substantial assets to a bank or financier if they have to every now and then, scurry to the shareholders for approval …* (emphasis added)

[261] What is clear from *Pioneer Haven* on the predecessor to s. 223(1)(b) of the Act is that the removal of the word "execute" in the previous s. 132C of the CA 1965 in 2007 demonstrated the Parliament's intention to limit the operation of the section to situations where the directors were carrying into effect the impugned transaction, as opposed to merely entering into it by executing an agreement.

[262] And in *Tan Chee Hoe & Sdn Bhd v. Code Focus Sdn Bhd* [2014] 3 CLJ 141; [2014] 3 MLJ 301, the Federal Court came to the same conclusion as did the Court of Appeal in *Pioneer Haven*, in interpreting the predecessor to s. 223(1)(b) namely s. 132C(1)(b):

A … [21] The current s. 132C was inserted by the Companies (Amendment) Act 2007 (Act A1299/07) which came into effect on 15 August 2007. *Under the provisions of sub-s. (1)(b) directors cannot carry into effect any proposal or execute any transaction for the disposal of a substantial portion of the company's undertaking or property unless the arrangement or transaction has been approved by the company in a general meeting. The approval of the shareholders in a general*
B *meeting must first be obtained before the transaction or disposal is carried into effect* …

[22] *Section 132C(1) statutorily emplaces that intra vires power of disposal of company's substantial property and undertaking in the hand of the shareholders at the general meeting and declares transaction as invalid and void without such*
C *shareholders' approval.* … (emphasis added)

[263] The intent of the Parliament in enacting the earlier s. 132C was to ensure that shareholders' knowledge and approval is obtained for any important acquisition or disposal.

D **Intention Of Parliament Under Section 223(1)(b)(i) And (ii) Of The Act**

[264] Does the new s. 223 of the Act change or alter this intention of Parliament? When the two parts of s. 223(1)(b)(i) and (ii) are perused, it is evident that:

E (i) (a) section 223(1)(b)(i) addresses the situation at the onset of entering into an arrangement for the acquisition or the disposal of a substantive asset. It offers or details an additional option available to the directors whereby at the point of entry into any such agreement, the directors may make such agreement, which is subject to shareholders' approval.

F (b) in practical terms this means that the need to advise the shareholders of the proposed acquisition or disposal may be made at the inception of the proposed transaction by making the agreement underlying such transaction "subject to" the obtaining of shareholders' approval by way of a resolution. In practical terms, this means that neither
G the acquisition or disposal as the case may be can proceed to realisation unless shareholders' approval at a general meeting is obtained;

(ii) (a) section 223(1)(b)(ii) addresses the situation at a later stage, namely
H at the point when ownership of the asset is either acquired or divested. Before the underlying primary agreement becomes binding and enforceable and prior to actual transfer of ownership either to, or from the company, the directors are bound to obtain shareholders' approval; and

I (b) in both instances, whether (b)(i) or (b)(ii), shareholders' knowledge and approval is ensured for any such important acquisition or disposal by the directors on behalf of the company. To that extent,

the intent and purpose of the Act does not alter or change in any manner whatsoever. It is shareholders' knowledge and approval that is sacrosanct and that is protected in both those statutory provisions.

How Is The Word 'Or' Between Subparagraphs (b)(i) And (b)(ii) To Be Read?

[265] Given the intention of the provision, the key issue is this: must both statutory provisions be complied with, or is it sufficient that only one or the other is complied with? And the answer to that question turns on how the word 'or' is to be construed.

[266] Is to be read disjunctively or conjunctively?

[267] Put another way does 'or' in that section mean "alternatively" or does it mean "and"?

[268] If it means the former, then only one of the two alternatives, namely sub-paras. b(i) or (b)(ii) need compliance; however if it is read as meaning 'and', as held by the Court of Appeal, then it means that both sub-paras. (i) and (ii) have to be complied with.

[269] The Court of Appeal held that the word 'or' meant 'and'. Both sub-paras. (b)(i) and (b)(ii) had to be applied and complied with, as they arose at different stages in the course of the transaction.

[270] The effect of such construction by the Court of Appeal is that any company seeking to acquire or dispose of an asset of substantive value needs to comply with both sub-paras. (i) and (ii). This in turn means that:

(i) the directors have to ensure that when the company enters into any arrangement or agreement for the acquisition or disposal of property of a substantive nature, such agreement or arrangement must be put to the shareholders at general meeting, who pass a resolution approving the entry into the agreement for such acquisition or disposal. In other words, the Court of Appeal read sub-para. (i) to mean that even prior to entry into an agreement to acquire or dispose of an asset, the approval of shareholders at general meeting had to be obtained.

[271] However, the proper, linguistic, structural and accepted interpretation of sub-para. (b)(i) under the standard and accepted mode of reading the English language, is that any entry into an agreement for such a transaction is made conditional upon the obtaining of shareholders' approval. In other words, a condition that must be complied with in order to achieve the acquisition or disposal of the company's asset is the obtaining of shareholders' approval at general meeting.

[272] Reading the words "subject to the approval of the company by way of a resolution" as amounting to a mandatory pre-condition to obtain actual approval prior to entry into an agreement for acquisition or disposal, with

respect, distorts the ordinary, plain and correct grammatical construction of sub-para. (b)(i). It is simply an incorrect use of the language to construe it thus.

[273] The only proper construction of sub-para. (b)(i) using grammatically precise and approved language is that any agreement for an acquisition or disposal by the company may at the outset be entered into and made "subject to" the condition that shareholders' approval at general meeting is obtained.

[274] This means that as long as it is understood between the company and the proposed vendor or purchaser that the acquisition or disposal will not go through unless and until shareholders' approval is obtained, the entry into such an agreement complies with the requirements of s. 223. And this in turn is because, as stated earlier, the final acquisition or disposal cannot be completed, until such shareholders' approval is obtained. If shareholders' approval is not obtained the transaction simply cannot proceed and will be aborted as the condition relating to shareholders' approval was not complied with.

[275] In relation to sub-para. (b)(ii), the Court of Appeal held that it also had to be complied with, in addition to sub-para. (b)(i), *ie*, conjunctively, by reading 'or' as 'and'. The consequence of such a construction is that shareholders' approval at general meeting has to be obtained for a second time, prior to the actual transfer of ownership of the asset to be acquired or disposed of, for the same transaction.

[276] The High Court, it will be recalled, held the same subparagraphs disjunctively, such that either the proposed transaction was made conditional upon or 'subject to' the obtaining of shareholders' approval, or alternatively at a later stage prior to the actual transaction being realised *ie*, the actual transfer of ownership of the substantial asset in question.

Our Conclusion On The Construction To Be Accorded To Section 223(1)(b)(i) And (ii) Of The Act

[277] Which then is the correct construction to be obtained? To our minds, it is clear that the correct legal construction to be accorded to s. 223(b)(i) and (ii) is that the two 'limbs' or subparagraphs have to be read disjunctively and not conjunctively.

[278] The use of the word 'or' means what it says, namely 'alternatively', and cannot be construed to mean 'and'.

[279] The reason for our conclusion, apart from the foregoing analysis above is this:

(i) if the section is construed as the Court of Appeal held it ought to be read, namely conjunctively, the consequence would be that for any corporate transaction the directors would have to:

(a) first, obtain shareholders' approval before entering into any form of agreement for a proposed acquisition or disposal of a substantive asset. In the instant case, it would mean that even prior to the HOA and prior to the BMA shareholders' approval would have to be obtained. The shareholders would have to agree to the proposed acquisition of Mercury without the full terms and the details of the acquisition having been worked out in full;

(b) it would be insufficient to make the HOA or the BMA 'subject to' shareholders' approval because the Court of Appeal reads sub-para. (b)(i) as imposing a mandatory requirement for such approval prior to entry into an agreement to that effect; and

(c) if shareholders' approval is obtained then the directors are allowed to proceed further to put into effect or complete the transaction.

(ii) but matters would not end there. The shareholders' approval then has to be obtained a second time prior to the actual transfer or putting into effect of the transaction. When is this to be done? The Court of Appeal felt that such shareholders' approval would be necessary prior to the signing of the BMA (notwithstanding that the BMA itself is 'subject to' shareholders' approval).

[280] The net effect of such a construction would be that the appellant would have to obtain shareholders' approval once prior to entry and for a second time either before or soon after the BMA when time for the actual transfer of the shares and consideration is exchanged, including the private placement.

[281] This begs the question, why? Why is shareholders' approval required twice in respect of the same transaction on the same terms? The need for two sets of shareholders' approval is, with great respect, irrational, unreasoned, unreasonable and runs counter to the principle of proportionality, given the purpose and intent of the section.

[282] In terms of commercial sense, which is an essential element in construing commercial transactions and the Act, it is equally flawed. Requiring directors who are accorded full powers of management of the company, to keep reverting to the shareholders on a continuous basis, adversely affects the performance of the company in terms of growth and expansion. The underlying ethos of the Act is to ensure that commercial transactions are fostered and fortified, not stultified or stifled. The costs involved in procuring shareholders' approval are considerable. Of greater concern is the time expended in procuring such consent. Business efficacy is key in promoting economic activities. Many transactions will be aborted and opportunities lost when the Act is construed to impose greater regulation than it actually does, or needs to.

[283] The requiring of two sets of shareholders' approval makes neither legal nor commercial sense, given the purpose and intent of the Act. As the primary purpose is to make shareholders aware of the proposed transaction and to get their approval for the overall aspects of the same, including matters like the private placement in the instant case for the purposes of obtaining quick financing, it is sufficient that shareholders' approval was obtained once. Shareholders' approval should moreover be obtained at the point when most details have been ironed out so that the shareholders have a fair comprehension of the entirety of the proposed transaction.

[284] That is why the section has provided two separate alternatives. The directors or management may choose to do so at the outset, upon entry into an agreement, and to make the transaction subject to shareholder approval. This means that they will go to the shareholders for the latter's approval when the corporate transaction has been worked out in sufficient detail to enable the shareholders to make a decision on whether they wish to approve the same or otherwise.

[285] Alternatively, they can work out all the details in furtherance of their powers of management and then obtain shareholders' approval prior to the actual corporate transaction taking effect, *ie*, the actual disposal or acquisition.

[286] This construction is in accord with both the purpose and accord of the Act and does not give rise to an absurd result. That absurd result being to obtain shareholders' approval twice for the same transaction at different points in time. This will eat into management powers and preclude the directors from exercising their powers to further the growth of the company.

[287] For these reasons, we conclude that the Court of Appeal erred when it held that s. 223(b)(i) and (ii) ought to be read conjunctively such that both sub-paras. (i) and (ii) are to be complied with in respect of any proposed corporate transaction.

[288] The Court of Appeal further erred when it held that shareholders' approval was required for entry into the HOA and the BMA. It failed to appreciate or comprehend that:

(i) the HOA was specifically stated to be a record of the understanding between Apex Equity and Mercury in respect of the proposed transaction. The fact that JF Apex which was a crucial party, did not even execute the agreement, precludes it from comprising any form of legal and binding document. The Court of Appeal chose to ignore the fact that the HOA was merely a record of an understanding of what would later materialise into a fuller agreement between all the relevant parties;

(ii) it was not tenable for the Court of Appeal to ignore a clear term in an agreement, namely the HOA, stipulating that shareholders' approval was a pre-requisite to the transaction. Even if the HOA is construed as a legally binding document, which it cannot possibly be, a salient term of any future agreement was that shareholders had to approve the transaction at a general meeting. To that extent, the HOA complied with s. 223(1)(b)(i), even though there was no necessity for such compliance at that juncture as JF Apex was not even a party;

(iii) the Court of Appeal erred when it ignored, or sought to contend that the clear condition precedent in clause 5 of the HOA did not comply with s. 223. It would appear, with respect, that the Court of Appeal arrived at that conclusion in order to conform with its construction of the requirement for shareholders' approval even prior to entry into an agreement;

(iv) similarly, the Court of Appeal erred when it failed to recognise or comprehend that the BMA, by providing expressly for a condition precedent, had made the entry into the corporate transaction 'subject to' shareholders' approval at a general meeting as required under s. 223(1)(b)(i). It further failed to, or did not comprehend that if shareholders' approval had not been obtained, as it was in the instant case, the corporate transaction would not have gone through. In such manner the shareholders' rights would have been fully preserved as intended under the Act;

(v) the Court of Appeal committed an error of law and fact when it failed to recognise that it was open to the company to obtain shareholders' approval at any time prior to the actual transfer of ownership of the shares of Mercury. In point of fact, the transaction could not have been carried out or implemented without shareholders' approval and would have been aborted in the absence of such approval;

(vi) in adopting an aberrant and unreasonable construction of s. 223(1)(b)(i) and (ii), by ignoring the plain and obvious word 'or' and applying a conflicting meaning to the said term, the Court of Appeal arrived at a conclusion that was not logical and contrary to both normal legal principles of statutory interpretation, as well as commercial sense and practice. The net result of the decision was that the entire transaction was aborted.

[289] We therefore have no hesitation in concluding that the Court of Appeal was palpably wrong in its construction of s. 223(b)(i) and (ii). In point of fact Apex Equity, through its directors, was in complete compliance with the law and adhered to the same in relation to the procurement of shareholders' approval at a general meeting. In actuality, two meetings were eventually held, as the first one was held to be contrary to law as explained at the outset.

[290] The fact that the BMA contained a condition precedent to the effect that shareholders' approval at general meeting had to be obtained for the proposed acquisition of Mercury by Apex Equity through the merger between Mercury and JF Apex, means that Apex Equity complied with sub-para. (b)(i) of s. 223(1). Having done so, there was no necessity for it to further comply with sub-para. (b)(ii) because, in the absence of shareholders' approval, the proposed acquisition would fall through or fail.

[291] For all these reasons, we reject the reasoning and the ultimate decision of the Court of Appeal in relation to s. 223(1)(b)(i) and (ii). The decision of the High Court is sound, correct and to be preferred. For clarity, we reiterate that it is sufficient if either s. 223(1)(b)(i) OR (b)(ii) is adhered to. It is not necessary to comply with both limbs of the subparagraph.

[292] In practical terms this means that:

(i) at the outset of a proposed corporate transaction, it is open to the directors/management to enter into an agreement which is conditional upon the obtaining of shareholders' approval for the transaction. This is to be gleaned from the words 'subject to'. In the event the condition is not complied with and shareholders' approval not obtained, the corporate transaction will fail;

(ii) alternatively, the directors/management can choose to obtain shareholders' approval at general meeting at a later stage prior to the actual implementation or execution or transfer of ownership of the substantial asset.

[293] In practical terms this means that:

(i) either of these modes of obtaining shareholders' approval or consent are acceptable under s. 223. No new or onerous conditions have been enacted under the said provision. On the contrary, the existence of sub-paras. (b)(i) and (ii) clarify and make it easier for the management to decide which option to adopt in respect of a corporate transaction.

[294] The intent and purpose of the new s. 223 remains in full accord with its predecessor s. 132C, in that its purpose is to ensure that shareholders are aware of, and approve of any proposed corporate transaction that will materially affect the company, due to the magnitude of the same or the effects it may have on the company.

The Insinuation By The Court Of Appeal That The Merger 'Jeopardised' Apex Equity

[295] Finally, it is worth noting that the Court of Appeal at paras. 59 to 61 appears to have considered the entire merger exercise as comprising something of a sinister plot on the part of Apex Equity (presumably its management) to virtually deceive its shareholders into a merger which was

wholly unbeneficial to Apex. This is because of the stress placed on Mercury receiving a consideration purchase of RM140 million coupled with the fact that Mercury would become a sizeable shareholder of Apex Equity and thereby the group with an equity of 37 per cent. The Court of Appeal failed to comprehend that in return for this consideration and sizeable shareholding in Apex Equity, Mercury was giving up the entirety of its operations, its licences and its identity so as to become a part of Apex. The value of the stockbroking business and its potential which would be acquired by the Apex group, appears to have been wholly ignored.

[296] Of greater concern is the added statement in the judgment that this merger would not comply with r. 4.01 of the Rules on Take-Overs, Mergers and Compulsory Acquisitions. The Court of Appeal failed to consider that the merger exercise had received the approval of the regulatory authorities, which is in the letter from the SC to JF Apex dated 21 February 2019.

'Unfair Prejudice' – Not Established

[297] The Court of Appeal also erred in concluding that the merger would 'unfairly prejudice' Concrete Parade as a shareholder because the value of its investments in Apex Equity would diminish. It failed to comprehend that the shareholders at general meeting had voted in favour of the merger. If the majority approved the merger, how then was Concrete Parade unfairly prejudiced? All shareholders would have suffered the same fate.

[298] More importantly, it is majority rule that prevails. The fundamental principle of governance in companies is the majority rule. As stated by the High Court, while s. 346 represents a statutory intrusion into that rule, it is fundamental that unfairly prejudicial conduct must be established. Section 346 or the cry of oppression, cannot be utilised in an attempt to circumvent a situation where majority rule prevails *bona fide*, as is the case here.

[299] Having completed our analysis, we now go on to answer questions (i), (ii) and (iii) as follows:

1. Question (i)

1.1. Where a company enters into any arrangement or transaction falling within s. 223 of the Act:

(a) Can s. 223(1)(b)(i) and (ii) of the Act be read disjunctively, such that it is sufficient if either:

(1) The agreements relating to the arrangement or transaction are expressly made subject to the approval of the company by way of a resolution; or

(2) The carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution?

A 1.2. **Answer to Question (i):**

Yes. For the reasons we have set out above we answer question (i) in the affirmative.

2. Question (ii)

B 2.1. Where two or more agreements are construed as forming one composite transaction constituting an arrangement or transaction falling within s. 223 of the Act for the acquisition or disposal by a company of substantial property, then:

C (a) Would s. 223(1)(b)(i) of the Act be satisfied if at least one of the agreements forming the composite transaction contains an express condition precedent requiring a resolution of the shareholders of the company for the said arrangement or transaction?

D (b) Would s. 223(1)(b)(ii) of the Act be satisfied by the passing of a resolution of the company in a general meeting approving the said arrangement or transaction before the arrangement or transaction becomes unconditional and binding on the parties to the arrangement or transaction and is carried into effect?

E 2.2. **Answer to Questions (ii)(a) and (b):**

Yes. We answer the question in the affirmative.

2.3. In the instant case the HOA contained a 'subject to' clause, although the Court of Appeal did not recognise it as such. As the HOA was not a legally binding or enforceable agreement by reason of the presence of such a condition, and as JF Apex was not a party to the same, it was not necessary for such a condition to be inserted. But as we have reasoned above, such a clause was clearly provided for in the same.

G 2.4. As for the BMA, it contained an express condition precedent to the effect that the acquisition was subject to shareholders' approval at a general meeting and therefore was compliant with s. 223(1)(b)(i). It further follows from our analysis that there was no necessity for a second set of shareholders' approval to be obtained prior to the actual acquisition taking effect.

H 2.5. Further, as the BMA could not possibly have the effect of 'carrying into effect' or 'implementing' or 'executing' the agreement by reason of the existence of the condition precedent, it is incorrect to say that it was in breach of s. 223(1)(b)(i) or (ii).

I

3. Question (iii)

3.1. Does s. 223(1) of the Act impose an "incumbent duty on the directors to inform shareholders" of any intention to 'enter into' and/or 'carry into effect' an acquisition or disposal of substantial assets of a company" based on the decisions in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616 and *Smithton Ltd (Formerly Hobart Capital Markets Ltd) v. Naggar* [2015] 1 WLR 189?

3.2. **Answer to Question (iii):**

No. We answer question (iii) in the negative.

[300] We now turn to the third issue that arises in these appeals:

Issue 3: Does A Contravention Of The Act (Which Concrete Parade Acquiesced To) In Relation To Share Buy-back Transactions Which Were Subsequently Validated, Amount To An Act Of Oppression *Vis-Á-Vis* Concrete Parade?

Secondarily, Can Section 582(3) Be Utilised To Rectify Such A Contravention?

[301] We now turn to the third issue which, in the context of this matter, is whether share buy-back transactions effected by Apex Equity between 2005 and 2017:

(i) with the full approval of the shareholders in a general meeting and unknown to either management or the shareholders as being *ultra vires* the articles of association of Apex Equity; and

(ii) subsequently validated *vide* the High Court order dated 29 April 2018;

amount to oppression against Concrete Parade as a minority shareholder by the majority shareholders of Apex Equity?

[302] The foregoing is the central issue, given that this is an oppression action filed by Concrete Parade.

[303] Ancillary to the foregoing is whether the "illegality" or more properly the contravention of the articles of association that resulted in *ultra vires* transactions, which were subsequently validated, by the High Court, comprise a matter that can be rectified under the provisions of s. 582(3) of the Act.

[304] Somehow this ancillary issue took up most consideration, notwithstanding that the central matter for adjudication in this appeal turns on the grievance of oppression by reason of such share buy-back transactions being performed by Apex Equity in the absence of articles in the articles of association permitting it to do so.

[305] A second issue was whether Concrete Parade, not being able to oppose the validation proceedings also amounted to oppression.

Salient Background Facts To The Share Buy-back Transactions

[306] The factual background to the oppression complaint in relation to the share buy-back transactions between 2005 and 2017, is as follows:

(i) between 2005 to 2017, Apex Equity obtained shareholders' approval at their yearly general meetings to buy-back its shares from the market;

(ii) these transactions continued for 12 years and shareholders' approval was granted on 12 separate occasions. A mandate was sought and obtained yearly during that period;

(iii) throughout this period, the directors of Apex Equity were under the mistaken belief that the AA of the company provided Apex Equity with the necessary authority to carry out the share buyback transactions;

(iv) Concrete Parade became a shareholder sometime in 2012/2013. Between then and 2017, a total of 1,977,800 shares were acquired by Apex Equity, which translates to approximately 0.93% of the total issued share capital of Apex Equity. Concrete Parade was a 4.68% shareholder. The materiality of such transactions on Concrete Parade *qua* shareholder is limited;

(v) on 22 May 2018, the directors and management of Apex Equity were alerted by Concrete Parade that the AA may not contain the necessary provisions conferring power on the company to buy-back its shares, contrary to what was previously believed by the directors and shareholders alike. This was brought to the attention of the full Board of Directors of Apex Equity on 23 May 2018;

(vi) the directors and management of Apex Equity sought the advice of Bursa Malaysia and also the Companies Commission of Malaysia (CCM), to no avail. Eventually, on the advice of its solicitors, Apex Equity applied to the High Court to validate all the transactions dating back from 2005 until 2017 utilising s. 582 of the Act;

(vii) the fact that this application was made to court was announced publicly on 1 August 2018, giving notice to all shareholders that this application was being made. This means that notice was effectively accorded to Concrete Parade as a shareholder. This is relevant in relation to whether Concrete Parade was in point of fact deprived of an opportunity to be heard on the validation exercise; and

(viii) on 29 August 2018, the High Court granted the validation application and an announcement was made on 26 September 2018 to Bursa Malaysia. Concrete Parade was not present at the hearing and its grievance is that it was deprived from attending and opposing the validation application. It is important to note that the High Court Order of 29 August 2018, remains on record and has not been specifically set aside, notwithstanding the Court of Appeal's declaratory order to collaterally set aside the same.

[307] On the basis of this factual matrix, Concrete Parade maintains that an illegality has been committed as the share buy-back transactions are not capable of rectification as they comprise an illegality, and that consequently, it has suffered damage *vis-à-vis* its rights *qua* shareholder, amounting to oppression by the majority.

The High Court Decision On The Use Of Section 582(3) Of The Act To Rectify The Problem With The Share Buy-back Transactions

[308] The High Court accepted that Concrete Parade may have been deprived of an opportunity to raise its objections at the validation proceedings in relation to the share buy-back transactions, but on the facts of the case, held that none of Concrete Parade's substantive rights as a shareholder in Apex Equity had been materially prejudiced. In short, it did not amount to prejudice. Accordingly, the grievance of oppression failed.

The Court of Appeal's Decision On Section 583(2)

[309] The Court of Appeal reversed the decision of the High Court. It held, *inter alia*, that:

(i) the act of the directors of Apex Equity in filing the validation proceedings without first amending the company's constitution was a blatant disregard of its AA and was oppressive to Concrete Parade;

(ii) the directors' failure to obtain the consent and authority of the shareholders for the filing of the validation proceedings denied Concrete Parade of the opportunity to participate in the said proceedings and to inform the court that:

(a) it had no jurisdiction to validate the transactions on account of the fact that they were unlawful/illegal; and

(b) the affairs of the company were being conducted in a manner prejudicial to and/or in disregard of the appellant's interests as a member of the company.

Parties' Submissions On The Third Issue

[310] Concrete Parade submitted that any contract entered into by Apex Equity to buy its own shares is illegal pursuant to the general prohibition of share buy-back under s. 67 of the CA 1965 and s. 123 of the Act. Further,

since Apex Equity's AA did not contain any authorisation for the conduct of shares buy-back, s. 67A of the CA 1965 and s. 127 of the Act did not apply. Concrete Parade further submitted that, s. 582(3) of the Act has no mention of any illegal or *ultra vires* act.

[311] On the point of whether Concrete Parade is attacking the order collaterally in separate proceedings in breach of the principle under *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 ('*Badiaddin*'), Concrete Parade maintains the position that as the share buyback transactions are illegal, the order is in effect a nullity susceptible to be set aside by this court following the principle in *Badiaddin*.

[312] In summary, the appellants together with Mercury contend that while there was a breach of s. 67A of the Companies Act 1965 and s. 127 of the Act, such breach under the Act is capable of being remedied by way of rectification under s. 582(3) of the Act.

[313] It was further submitted that although the word 'illegality' does not appear in s. 582(3) of the Act, a breach of s. 127 of the Act falls under "any breach of this Act that has occurred", whereas illegality is the consequence of such breach. It is their submission that s. 582(3) of the Act does not specify any specific provisions or situations where it should not be used, consequently, there are no restrictions as to when s. 582 of the Act can be applied.

Analysis

[314] As the share buy-back transactions were effected between 2005 and 2017, these transactions straddle both s. 67A of the Companies Act 1965 and s. 127 of the revised Act respectively.

[315] It is important to note that the contraventions referred to in respect of the share buy-back transactions are primarily in relation to s. 67A and s. 127 respectively rather than ss. 67 and 123 which deal primarily with financial assistance for subscription to a company's own shares. This distinction is important because ss. 67A and 127 actually permit a public listed company to purchase its own shares provided it is authorised by its constitution. In that sense it is different from ss. 67 and 123 respectively that prohibit and make it an offence for any form of financing by a company for the purchase of its own shares.

[316] Section 67A provides as follows:

> **Section 67A. Purchase by a company of its own shares, *etc*.**
>
> (1) **Notwithstanding section 67, a public company with a share capital may, if so authorized by its articles, purchase its own shares.**
>
> (2) A company shall not purchase its own shares unless:

(a) it is solvent at the date of the purchase and will not become insolvent by incurring the debts involved in the obligation to pay for the shares so purchased;

(b) the purchase is made through the Stock Exchange on which the shares of the company are quoted and in accordance with the relevant rules of the Stock Exchange; and

(c) the purchase is made in good faith and in the interests of the company …

…

…

(7) If default is made in complying with **this section**, the company, every officer of the company and any other person or individual who is in default shall be guilty of an offence against this Act. (emphasis added)

[317] It is clear from a reading of the section that there was a lack of compliance with sub-s. 1 in that there was a lack of authorisation in the articles of association of Apex Equity allowing it to purchase its own shares.

[318] The question that arises for consideration is whether a contravention of s. 67A(1) in itself amounts to an illegality rendering all the share buy-back transactions void and unenforceable.

[319] This requires firstly an examination of the purpose and object of the introduction of s. 67A *vide* the Companies (Amendment) Act 1997. The explanatory statement to the Companies (Amendment) Bill 1997 states that s. 67A was introduced to enable:

… **A company to purchase its own shares** and give financial assistance to a person to purchase shares in the company **if it is made in good faith and in the interest of the company** … (emphasis added)

[320] The facts in the present appeals disclose that the share buy-back transactions appear to have been undertaken in good faith and in the interest of the company. This is borne out by the fact that the directors took the issue of these buybacks to the shareholder organ on a yearly basis, despite there being no requirement to do so.

[321] Therefore, what is established is that the share buyback transactions are, at the highest, a contravention of only sub-s. (1) of s. 67A. There is no contravention of sub-s. 2 of s. 67A, which is a material provision in relation to sub-s. (7).

[322] Can it be concluded that a failure to comply with sub-s. (1) only of s. 67A, renders the share buy-back transactions void and unenforceable and thereby an illegality?

[323] In *Yango Pastoral Co Pty Ltd & Ors v. First Chicago Australia Ltd & Ors* (1978) 21 ALR 585, Gibbs ACJ addressed this issue thus:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. The statement is true as a general rule, but for complete accuracy it needs qualification because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly that the contract will be valid and enforceable. However cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable and in most cases it is sufficient to say, as has been said in many cases of authority that the test is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, *it is a question of construction whether the statute intends to prohibit the contract in this sense, that is to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.* (emphasis added)

[324] And in *The Co-operative Central Bank Ltd (In Receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300; [1995] 3 MLJ 313, Edgar Joseph Jr FCJ who was examining the effects of a contravention of s. 133 of the Companies Act 1965 on the validity of loan and charge transactions registered under the National Land Code, stated:

> Nevertheless, the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering it, shall be void and unenforceable, **unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself** (see *Holman v. Hohnson* [1775] 98 ER 1120 at p 1121; *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356). **However the general rule is subject to exceptions and, at the end of the day, it is a question of construction of the particular statute.**

[325] Applying the reasoning in *Yango Pastoral* and *Feyen* to the present situation it is apparent that:

(i) firstly the share buy-back transactions as contracts, are not in themselves prohibited by the statute. In point of fact ss. 67A and 127 permit such share buy-back transactions by a public listed company, provided the other subsections are met. So there was no illegality *per se* in undertaking such transactions as may be the case under ss. 67 and 123 of the Acts respectively;

(ii) it is a question of construction of ss. 67A and 127 as to whether the share buy-back transactions in the instant appeals that were undertaken allegedly *ultra vires* the constitution are illegal;

(iii) the construction of those two sections and the legality of the share buy-back transactions are not the central issue in the instant appeals. It is not the subject matter of determination in these appeals. It requires separate adjudication in relation to the legality or otherwise of those transactions specifically.

(iv) here, the central issue is whether the undertaking of those share buy-back transactions amounted to conduct oppressive to the minority shareholder Concrete Parade by the majority, causing it to suffer unfair prejudice.

[326] In conclusion, in relation to s. 67A, it is not possible to stipulate with any certainty whatsoever that the share buy-back transactions undertaken without authorisation in the articles of association of Apex Equity amounted to an illegality *per se*.

[327] As it is not possible to so conclude it follows that the alleged illegality of those share buy-back transactions cannot form the basis for a complaint of oppression. Perhaps more significantly, even if it did, it is not evident how Concrete Parade suffered unfair prejudice as compared to any of the other shareholders. Concrete Parade as a minority shareholder cannot be said to have suffered as a consequence of any oppressive act on the part of the majority. The majority themselves, if indeed there was an illegality perpetrated, have suffered the consequences in exactly the same manner as Concrete Parade. Therefore, there can be no case of oppression made out under this head.

[328] Moving on to s. 127 of the Act, the position is even clearer. Section 127 of the 2016 Act, is worded differently. It provides as follows:

> **Purchase by a company of its own shares, *etc*.**
>
> *127(1) Notwithstanding section 123, a company whose shares are quoted on a stock exchange may purchase its own shares if so authorised by its constitution.*
>
> *(2) A company shall not purchase its own shares unless:*
>
> (a) the company is solvent at the date of the purchase and will not become insolvent by incurring the debts involved in the obligation to pay for the shares so purchased;
>
> (b) the purchase is made through the stock exchange on which the shares of the company are quoted and in accordance with the relevant rules of the stock exchange; and
>
> (c) the purchase is made in good faith and in the interests of the company.
>
> …
>
> (16) A company shall lodge with the Registrar and the stock exchange a notice of the purchase of the shares in a manner to be determined by the Registrar within fourteen days from the purchase of the shares.
>
> *(17) The company, every officer and any other person or individual who contravene subsection (2) commit an offence and shall on conviction be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.*

A (18) The company and every officer who contravene subsection (6) shall, on conviction be liable to a fine not exceeding fifty thousand ringgit and in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction. (emphasis added)

B **[329]** It is evident from the new provision that the mischief the Act seeks to catch and make an offence relates primarily to the purchase of its own shares by a public listed company where:

(i) the company is insolvent;

C (ii) the purchase is not conducted through the stock exchange (although there are further exceptions in the section); and

(iii) where such purchases are not made in good faith or in the best interests of the company.

D **[330]** Therefore, it would be difficult to conclude with any degree of certainty that the fact of the share buy-back transactions being *ultra vires* is, in itself, an illegality. It is again a matter of construction of the statute as explained above in *Yango Pastoral* and *Feyen*.

[331] In any event that is not the thrust of the complaint by Concrete Parade. Concrete Parade instead contends that it has been unfairly prejudiced by the E action of the majority in carrying out these transactions.

[332] However the fact that there has been a contravention of sub-ss. 1 of ss. 67A and/or 127, does not equate to Concrete Parade being unfairly prejudiced by the majority in the carrying out of these share buy-back F transactions.

[333] In the instant appeals it is evident that Apex Equity was at all times solvent, made the purchases through the exchange and did so in the best interests of the company, *bona fide*. The thrust or intent of ss. 67A and 127 is to preclude and prohibit the purchase of a public listed company's own G shares unless there is authorisation, and to ensure that such purchases are undertaken when the company is financially healthy, transacted through the exchange and are *bona fide* in the interests of the company.

[334] Here too, Concrete Parade approved and acquiesced to the share buy-back provisions from 2013 or 2014 onwards.

H

[335] When the lack of authorisation was made known by Concrete Parade, the immediate reaction of Apex Equity was to seek to regularise the matter.

[336] Concrete Parade's grievance is that they were not accorded notice of the validation proceedings which deprived them of the opportunity to I challenge or resist the validation order. However, such an allegation lacks credibility in view of the fact that notice was accorded publicly, as set out

earlier, *vide* Apex Equity's announcement of its intention to seek validation proceedings. Concrete Parade took no steps to advise Apex Equity of its opposition to any proposed validation proceedings at this juncture. It made no attempt to ask to be advised of the date of the proposed validation proceedings, as it could have. It only complained of a lack of notice as a part of its oppression grievance in the suit.

[337] In any event, we concur with the High Court that the lack of notice, in itself, is incapable of comprising prejudicial conduct by the majority shareholders against it, a minority shareholder as envisaged under s. 346.

The Non-Approval Of An Amendment To Authorise Share Buy-back Transactions In Apex Equity's Constitution

[338] The fact that the shareholders did not, in 2019, approve an amendment to the articles allowing for such buy-back provisions to be inserted does not assist the situation. This is because any such amendment would only have had effect from 2019 and not earlier. It would not go on to 'sanitise' the defect of a lack of authorisation in the articles in respect of the 2005-2017 transactions, because any such amendment would not have retrospective effect.

Was There Oppression Against Concrete Parade By Reason Of The Share Buy-back Transactions, Which Were *Ultra Vires* The Constitution Of Apex Equity?

[339] The key question in these appeals, for this court is whether, given the lack of authorisation in the articles of Apex Equity for such buy-back transactions, has the minority shareholder, Concrete Parade been unfairly discriminated against or suffered unfair prejudice at the hands of the majority shareholders so as to amount to oppression as envisaged under s. 346 of the Act?

[340] Our considered view is that it is difficult and untenable to conclude that the lack of compliance with sub-s. (1) of s. 67A of the Companies Act 1965 or 127 of the Act respectively, *ie*, the fact of the purchases being *ultra vires* the constitution, resulted in oppressive conduct against Concrete Parade. In any event, it is moot whether there has been a lack of compliance with sub-s. (1) of s. 67A of the Companies Act 1965 or s. 127 of the Act respectively, when the articles do not prohibit share buy-backs under either ss. 67A or 127.

[341] It cannot be said that Concrete Parade, as a minority shareholder of Apex Equity, was subjected to unfairly prejudicial conduct by the majority shareholders of Apex Equity, as envisaged under s. 346 of the Act.

[342] And that is because firstly, the fact of the share buyback transactions being *ultra vires* Apex Equity's constitution does not necessarily equate to an illegality. Secondly, and more importantly, Concrete Parade has failed to

establish how the fact of the share buy-back transactions being *ultra vires* the constitution, unfairly prejudices it as a minority shareholder. What is the damage that it has suffered *qua* shareholder?

[343] Given that all the shareholders of Apex Equity were equally affected by these transactions, how is Concrete Parade alone singularly and unfairly prejudiced as compared to the majority of the shareholders of Apex Equity? If all the shareholders are in the same position as Concrete Parade, how can that amount to unfairly prejudicial conduct by the majority against the minority?

[344] This grievance is more properly characterised as a management versus shareholder (as a whole) complaint, rather than a minority-majority shareholder grievance. Accordingly, any attempt to fit it into an oppression claim is misplaced.

[345] Further, given that this is an oppression action under s. 346, why are the majority shareholders who approved the share buy-back transactions, and who were allegedly oppressing Concrete Parade, not joined as parties?

[346] The reality is that the majority shareholders who approved the share buy-back transactions, were not joined as parties to the oppression action. These transactions could not have been carried out without their approval.

[347] To that extent it is clear that this complaint is unsubstantiated as the proper parties are not present in the action, the cause of action is unclear, and no damage to Concrete Parade *qua* shareholder has been shown, because all the shareholders of Apex Equity faced the same consequences as a result of the share buy-back transactions.

[348] In this context, the Court of Appeal erred in:

(i) concluding with certainty that the *ultra vires* transactions comprised an illegality under the relevant sections, when for the reasons we have given, this issue remains in doubt;

(ii) concluding that such *ultra vires* transactions, which involved the entirety of the shareholders of Apex Equity, resulted in unfairly prejudicial conduct against Concrete Parade as a minority shareholder. The Court of Appeal failed to consider that all the shareholders would be equally affected by the share buy-back transactions;

(iii) failing to consider that Concrete Parade itself had approved the transactions from the years 2013 or 2014 onwards when it became a shareholder. In this context, its delay and acquiescence are salient matters that ought to have been taken into consideration when considering the allegation of oppression, that too against the directors, and not the majority shareholders;

(iv) as stated by the appellants, and with which we concur, between 2013 and 2017, a total of 1,977,800 shares were acquired by Apex Equity, which translates to approximately 0.93% of the total issued share capital of Apex Equity. These transactions would not have any material effect on the interests of a shareholder, much less on Concrete Parade as a 4.68% shareholder. Again, it is stressed that all shareholders were equally affected by these buy-back transactions, making unfairly prejudicial conduct unlikely; and

(v) the failure to join the majority shareholders who approved the transactions also militates against a finding of oppression as the basic requirements of a minority oppression action as envisaged under s. 346 have not been met.

[349] In these circumstances, we are satisfied that oppression has not been made out and that the Court of Appeal erred in so concluding in respect of the share buy-back transactions. The decision of the High Court is correct and is preferred.

Can Section 582(3) Of The Act Be Utilised To Rectify An Illegality?

[350] Given our analysis above, where we have concluded that oppression is not made out, we do not think it necessary to finally determine this issue. Suffice for it to be said that we accept the position of *amicus curiae* in general that s. 582 of the Act ought not to be utilised to rectify an illegality.

[351] However, as we have pointed out above, it is not certain beyond doubt, that the lack of authorisation in the constitution for share buy-back transactions, and the subsequent carrying out of those transactions by the company, amounts to an illegality as envisaged by s. 67A of the Companies Act 1965 and s. 127 of the Act.

[352] As the issue in these appeals is whether or not the *ultra vires* share buy-back transactions conducted between 2005 and 2017 amounted to unfairly prejudicial conduct *vis-à-vis* Concrete Parade, it is not necessary for us to examine this issue.

The Decision On Validation By The High Court Dated 29 August 2018 And The Decision Of The Court Of Appeal In This Action Declaring The High Court Order Void

[353] Finally, we note that the Court of Appeal made a declaration that the decision of the High Court dated 29 August 2018 validating the share buy-back transactions was wrong in law or illegal, and purported to collaterally declare the same as void and to set it aside, applying the principle in *Badiaddin.*

[354] It will be recalled that Concrete Parade takes the position that the order of the High Court dated 29 August 2018 validating the share buyback transactions is a nullity as those transactions are alleged to be illegal.

[355] In *Badiaddin,* both Mohd Azmi FCJ and Gopal Sri Ram JCA (later FCJ) made reference to the general rule in relation to orders that are a nullity. Quoting from Abdoolcader J in *Eu Finance Bhd v. Lim Yoke Foo* [1982] CLJU 21; [1982] 1 LNS 21; [1982] 2 MLJ 37 at 39, they approved the reasoning there:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

[356] In the instant appeals, as we have concluded earlier, it cannot be said with any degree of certainty that the share buy-back transactions are in fact illegal as such a conclusion would require a full determination and construction of ss. 67A and 127 as we have stated earlier. In such circumstances, it cannot be concluded that the order of 29 August 2018 is a nullity by reason of illegality. This is not a case where the illegality is *ex facie* apparent. We have earlier explained that the purchase by a public listed company of its own shares is in point of fact permitted under ss. 67A and 127 as provided in those sections. The fact that one sub-section in those sections has not been complied with does not automatically mean that the entire transaction is void for illegality. Therefore, it cannot also be concluded that the order is a nullity by reason of illegality. As such, the general rule in *Eu Finance* does not come into play.

Gopal Sri Ram JCA went on to state at p. 426 at F:

> … Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

[357] Again, it is apparent that such a collateral attack on the order of the High Court on 29 August 2018 can only be made upon the illegality being clearly shown. No such illegality has been clearly shown here for the reasons we have articulated above. Therefore, the Court of Appeal erred in applying the general rule in *Eu Finance* and the principle in *Badiaddin* when it was not possible to conclude with any certainty on the present facts, that an illegality subsisted in relation to the share buy-back transactions.

Summary

[358] As it is in doubt whether an illegality has been clearly established by reason of the contravention of ss. 67A(1) and 127(1) of the Acts respectively, the Court of Appeal ought not to have utilised the case of *Badiaddin* to seek to set aside the validation order granted by the High Court on 29 August 2018. As matters stand, the Court of Appeal erred in seeking to collaterally set aside the High Court order on the facts of the present appeals.

Questions (v) And (vi)

[359] For completion, we turn now to questions (v) and (vi) which read as follows:

(i) Question (v):

(a) where a public listed company whose shares are quoted on the stock exchange purchases its own shares though not authorised by its constitution, whether the court may validate the purchases under s. 582(3) of the Act (s. 355(3) Companies of the Act 1965) irrespective of whether the company's constitution has since been amended to authorise it to purchase its own shares?

(b) Answer: We choose not to answer this question as it is not necessary for the disposal of this appeal.

(ii) Question (vi):

(a) if the answer to Question (v) is in the affirmative whether the approval, consent or authority of the shareholders of a public listed company is required before the company can initiate validation proceedings under s. 582(3) of the Act (s. 355(3) Companies of the Act 1965) to validate the said purchase of shares?

(b) Answer: We choose not to answer this question for the same reason.

The Fourth Issue: Is this Oppression Action Properly Brought?

[360] We now turn to the final issue and question (vii). As stated at the outset, the fourth issue in this appeal is whether the use of the oppression provision is indeed the proper means of remedying Concrete Parade's grievances, if such grievances are made out.

[361] As we have concluded above, Concrete Parade has failed to establish a contravention of either s. 85 or of s. 223(1)(b)(i) and (ii) of the Act. Neither has an illegality been conclusively established in relation to s. 67A of the Companies Act 1965 or s. 127 of the Act in relation to the share buy-back transactions.

[362] Question (vii) in turn reads as follows:

(i) whether, in an application under s. 346 of the Act, the court may make a finding that the affairs of a public-listed company have been conducted oppressively by the directors on the basis that there has been a denial of a shareholder's statutory right to vote on any arrangement or transaction or other corporate exercise requiring shareholders' approval by law when:

(a) all shareholders were given the opportunity to vote before the arrangement or transaction or corporate exercise in question became legally binding and effective;

(b) the shareholders of the company in general meeting had voted to approve the arrangement or transaction or corporate exercise in question; and

(c) the shareholders who voted in favour of the arrangement or transaction or corporate exercise were not made parties to the oppression proceedings against the company and its directors?

(ii) **Answer to Question (vii):**

No. We answer Question (vii) in the negative.

[363] Our reasons for answering so have effectively been addressed throughout the grounds of judgment.

[364] As is stated in the course of the judgment, can Concrete Parade's grievance amount to oppression when the majority of the shareholders approved the merger and the consequent 'dilution' of their shareholding?

[365] As the majority approved the merger, meaning that majority rule was in favour of the merger, how can unfairly prejudicial conduct prevail or even come into operation in light of the majority vote of the shareholder organ of the company?

[366] The Court of Appeal failed to appreciate or comprehend this fundamental issue in determining this appeal, with respect. (See also *In The Matter Of Tong Eng Sdn Bhd* [1994] 2 CLJ 775; [1994] 1 MLJ 451; *Pan Choon Weng v Mexvin Chow Yew Hoong & Ors* [2022] CLJU 2248; [2022] 1 LNS 2248; [2022] MLJU 2357; *Seah Eng Toh Daniel & Anor v. Kingsley Khoo Hoi Leng & Ors* [2016] 2 CLJ 695).

Parties

[367] As expressly stated in response to the third issue above, it is incorrect in an oppression action to fail to join the majority shareholders who are alleged to have oppressed Concrete Parade. However, in the instant case they are not joined. This is fatal to an oppression action which is premised on unfairly prejudicial conduct by the majority against the minority. Only the directors are joined.

[368] And the reason for this failure to join the majority shareholders but to focus on the directors, is because Concrete Parade's complaint does not afford it grounds for an oppression action. If indeed the allegations were substantiated (which they were not, as we found no contravention of either ss. 85 or 223) it should have been brought as an action against the officers of the company or directors (if indeed there was sufficient evidence or basis) for contravening provisions of the Companies Act and thereby causing damage to the company, and seeking redress for the company.

[369] Alternatively, as an action against the directors for contravention of the Companies Act, resulting in damage or loss to the company. But instead of that, Concrete Parade chose to bring an oppression action when the circumstances did not disclose the basis for any such action.

[370] Put another way, Concrete Parade's grievance is, in reality, against the decision of the majority, or majority rule, which grievance it seeks to couch in terms of an oppression action under s. 346 of the Act. This is an abuse of the statutory oppression remedy.

[371] Further, in the originating summons filed, relief is sought by Concrete Parade against the directors of Apex Equity. However, the grievances under ss. 85 and 223 of the Act, as pointed out by the appellants, arise by reason of the vote of the majority shareholders at general meeting.

[372] Again, as pointed out by the appellants, if at all there is oppression, it is not because of the directors' actions in proposing the merger and the mechanics of the merger exercise to the shareholders. It is because the alleged contraventions of the Act, particularly ss. 85 and 223, were brought about because the shareholders as a body voted in favour of the merger.

[373] These two statutory provisions, 85 and 223 and article 11 confer the ultimate decision in relation to the corporate transaction or merger, to the shareholders. The directors do not and cannot determine the matter themselves. To that extent the directors cannot be made responsible for the alleged acts of oppression which arose from the decisions of the body of shareholders.

[374] However, Concrete Parade seeks to hold only the directors liable for the oppression related complaints, more particularly in relation to grounds (xi), (xii), and (xiv) of the oppression action and to find them culpable. This is incorrect because the directors play no role in the voting. Moreover such prayers and reliefs do not align with a claim under s. 346 of the Act.

[375] The conduct of Concrete Parade warrants comment. Having approved and acquiesced with the share buy-back transactions, and notwithstanding that the merger itself was approved by the shareholder body at general meeting, Concrete Parade nonetheless chose to bring an oppression action when it knew, or ought to have known, that on the grounds of majority rule alone, there was no basis for an oppression action.

[376] This begs the question of whether the use of the alleged contraventions of the Act more particularly ss. 85, 223(1)(b)(i) and (ii) as well as ss. 67A or 127 were made the basis of an oppression action, not for the purposes of obtaining relief against the majority (particularly when they were not even joined) but in reality to hinder or bring to a halt the proposed merger? In short, was the oppression action filed for a collateral purpose? The factual matrix appears to bear such a conclusion out.

[377] After all, no attempt has been made to explain how Concrete Parade was unfairly prejudiced in its capacity as a minority shareholder, as a consequence of the proposed merger and the alleged contraventions, any more than any other shareholder. Of particular significance is the failure or omission of Concrete Parade to establish or display evidence of:

(i) unfairly prejudicial conduct which it alone suffered (given that all the shareholders were affected in an identical manner);

(ii) unfairly prejudicial conduct by the majority that has affected Concrete Parade as a minority shareholder;

(iii) how it can claim unfairly prejudicial conduct against it as a shareholder when the majority of the shareholders voted in favour of the merger. The majority will prevails and does not constitute grounds for oppression; and

(iv) the majority were not even joined and relief was sought against the directors in the oppression action signalling that the action was brought for a collateral purpose. It amounted to an abuse of the statutory process under s. 346.

Conclusion

[378] In all of these circumstances the allegations of oppression fail on both substantive and procedural grounds. We have no hesitation in allowing these appeals.

[379] The appeals are therefore allowed with costs. We set aside the decision of the Court of Appeal and reinstate the decision of the High Court.

Endnotes:

1. See p. 3 of the article entitled *'Shareholders' Pre-Emption Rights to New Shares the Legislative and Regulatory Scheme* [2022] 4 MLJ lxiv.
2. It appears to us that the case of *Smithton* is of limited assistance here as it concerns substantial property transactions between a company and its directors. In the UK, such transactions are governed under s. 190 of the UK Companies Act 2006 whereas in Malaysia, these transactions are governed by section 228 of the Act. *Smithto*n neither established nor supported the interpretation as suggested by the Court of Appeal in the

present case. In fact, the English Court of Appeal made passing remarks on the old s. 190 of the UK Companies Act 2006, supporting the notion that it would be inconvenient if arrangements could not be made conditionally: "94 The words in subsection (1) "or is conditional on such approval being obtained" did not appear in s. 190 when originally enacted. That produced the inconvenient result that arrangements could not be made conditionally on shareholder approval subsequently being obtained."